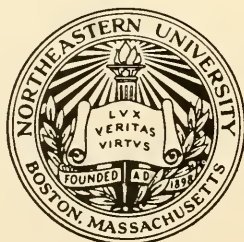




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**FREEDOM OF INFORMATION  
EXECUTIVE PRIVILEGE  
SECURITY IN GOVERNMENT**

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**HEARINGS  
BEFORE THE  
SUBCOMMITTEES ON  
ADMINISTRATIVE PRACTICE AND PROCEDURE  
AND  
SEPARATION OF POWERS  
OF THE  
COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE  
AND THE  
SUBCOMMITTEE ON  
INTERGOVERNMENTAL RELATIONS  
OF THE  
COMMITTEE ON  
GOVERNMENT OPERATIONS  
NINETY-THIRD CONGRESS  
FIRST SESSION  
ON  
S. 1142, S. 858, S. Con. Res. 30, S.J. Res. 72, S. 1106,  
S. 1520, S. 1923, and S. 2073**

**JUNE 7, 8, 11, 26, 1973**

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# S. 1142—TO AMEND THE FREEDOM OF INFORMATION ACT

THURSDAY, JUNE 7, 1973

U.S. SENATE,  
SUBCOMMITTEE ON ADMINISTRATIVE  
PRACTICE AND PROCEDURE,  
COMMITTEE ON THE JUDICIARY  
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 9:50 a.m., in Room 4200, New Senate Office Building, Senator Edward M. Kennedy (chairman of the subcommittee) presiding.

Present: Senator Kennedy (presiding).

Also present: Thomas M. Susman, Assistant Counsel; Alfred Friendly, Jr., Counsel, Subcommittee on Intergovernmental Relations; and Ann Landman, Staff Member.

## OPENING STATEMENT OF SENATOR EDWARD M. KENNEDY

Senator KENNEDY. The subcommittee will come to order.

In a few minutes the Watergate hearings will resume in the Caucus Room. So far, in both the hearings and related news stories, the most startling revelations have concerned the clandestine activities of Federal officials. It becomes increasingly apparent that what we do not know about these activities can—and has—hurt us.

Our hearings this morning and the Watergate hearings reflect different symptoms of the same malady—the refusal of government officials to disclose fully and freely their actions and records. It is perhaps no coincidence that Special Counsel John Dean was considered the executive branch's expert on the doctrine of Executive privilege, and that a special White House study of Government classification procedures involved E. Howard Hunt. Mrs. Harmony may have said last Tuesday that she didn't think that clandestine meant illegal—but I have a feeling that each day more and more Americans would disagree.

In 1965, this subcommittee's hearings on the Freedom of Information Act were filled with statements by executive branch officers that Government cannot possibly operate in a fishbowl. Both Congress and the public may now feel that a lighted fishbowl serves the public interest far better than a dark room in the basement of the White House.

Until 1966, the Federal statute books contained no provisions opening the inner workings of our Government to the public view.

The passage of the Freedom of Information Act was the first broad step toward open Government, but we are here this morning to consider the charges of many that despite its good intentions, it has not worked—that the act has become a “freedom from information” law, and that the curtains of secrecy still remain tightly drawn around the business of our government. In doing so, we are focusing on S. 1142, which would amend the bill in many respects. I hope that our witnesses will view this bill as a working draft; a number of suggestions for improvement have already been brought to our attention, and we will expect further instructive comments in these hearings.

I would like to suggest four ideas which do not appear in this bill. I hope we can get some response to these ideas this morning:

First, I would propose that every Government official involved in deliberations leading to a denial of information be identified on the public record. Just as the proposed legislation's requirement that denials be collected allows for an assessment of an agency's responsiveness to Freedom of Information Act requests, so also should the track record of each individual official at every level be open to public evaluation.

Second, I would suggest applying the internal communications and investigatory file exemptions only to records involved in actively pending decisionmaking or law-enforcement proceedings. There may be a legitimate need to avoid premature disclosures in some areas, but I believe that public evaluation of the procedural and substantive integrity of governmental processes outweighs any imagined inhibition of advice-giving within agencies. Informers and persons named as objects of investigations can be fully protected by the exemption from disclosure of information constituting invasions of personal privacy.

Third, I would suggest that administrative appeals from information denials not go through the agency initially refusing access, where egos and self-protective instincts remain in full force, but to an independent agency with special expertise. Rather than creating a new such agency, I would suggest that the Administrative Conference of the United States be given that function. The Conference is composed of Government and public members, and could be fitted with a statutory mechanism for handling administrative appeals, with the same time limits set out in S. 1142. This agency would not only apply the law objectively, but could also be directed to encourage release whenever possible.

Finally, I would apply the FOIA to both the Congress and the White House. Certainly the public has through the electoral process a readily available remedy for reflecting dissatisfaction with ultimate decisions—a remedy not available against civil servants. Nonetheless, I believe that Congress ought to live with, and the public should benefit from, the same openness it is willing to impose on another branch of Government. This goes for the White House, too.

It may indeed be difficult to legislate openness in Government as it is to legislate honesty in Government, but that certainly does not mean the Congress should not keep trying. Surely “public business is the public's business,” and we must strengthen the Freedom of Information Act to make this maxim a reality.

I would like to welcome this morning two of the Members of the Senate who have been most interested in the area of opening up Government to greater public view, Senator Moss and Senator Chiles.

Senator Chiles, as a member of the Florida Legislature, was extremely active in development of the sunshine law, making Florida one of the leading States in developing procedures to open up the various departments of Government. Senator Moss has been active in Congress as a strong advocate of the American consumer and a vigorous supporter of the efforts of Congress to assert its full powers under the Constitution.

I don't know how you would like to proceed, who has got the most pressing schedule, but we will be glad to hear you.

Senator CHILES. Go ahead.

### STATEMENT OF HON. FRANK E. MOSS, A U.S. SENATOR FROM THE STATE OF UTAH

Senator Moss. I appreciate the Senator from Florida deferring to me. Since I have a hearing to conduct, I accept the generous offer. If I may proceed I would like to do so, Mr. Chairman—I have a more lengthy statement that I will ask to be included in full in the record. At this time I have a summary that I would like to read if I might.

Senator KENNEDY. We will include your statement in its entirety.

Senator Moss. Mr. Chairman, I appreciate the opportunity to appear before your distinguished subcommittee. I wish to address an issue that is the source of great controversy in the United States. It concerns the question over what is, or should be, the extent of Executive privilege as it relates to congressional inquiry. In recent weeks, a confrontation of increasing proportions has grown between two separate and equal branches of Government—the executive and the legislative—over this issue. Unless a solution that asserts the proper role of the Congress to acquire information is found, Government as we have known it may not continue.

### NIXON RECORD

President Nixon has not been entirely candid in his position on Executive privilege. His actions speak far more loudly than his words. In 1948, Richard Nixon, as a Congressman from California, questioned, rather strongly, whether President Truman's refusal to furnish information for a congressional investigation was justified. Nixon contended that an order of the President

denying the Congress of the United States information it needed to conduct an investigation of the Executive Department \*\*\* can be questioned by the Congress.

And, as President, Nixon has given several indications that Executive privilege would not be invoked to shield conversations or withhold information that might be embarrassing if made public.

But, repeatedly, in contradiction to his stated position, the President has made use of executive secrecy to hinder the Congress in its acquisition of information. No less than 19 instances can be cited in



which the President, or members of executive departments and agencies, refused to provide documents or information to congressional committees or Members of Congress during President Nixon's first term in office. The President has forgotten that the executive body has a special responsibility to furnish all information asked by the Congress unless the national security clearly would be damaged. And the burden of proof of such damage must be on the executive department.

Most recently, as a result of the embarrassing news from Watergate, a changed attitude toward executive privilege seems to emanate from the White House. The President's attempt to prevent White House staff members to tell what they know about the Watergate scandal is just one addition to such celebrated cases as the attempted hushing in the *Fitzgerald* case. It is inconceivable that the Congress can put any assurance in Presidential statements on executive privilege when such wide disparity exists between words by the President and/or staff members and their actions.

#### HISTORICAL PERSPECTIVE

No historical evidence exists that executive privilege has ever been intended to mean a check on the legislative power of inquiry. A representative sampling of political scholars and practitioners of the subject indicate the historical importance that has been placed on the right of Congress to get information. These precedents include 17th- and 18th-century arguments in the English House of Commons; American colonial arguments; provisions in early State constitutions; statutes and precedents of the early Republic; court decisions; statements by 19th-century attorneys general; and observations by scholars of the subject. We must not assume that the power of Congress to investigate, established several times during the first century of our history in civil as well as military actions of the Executive Office, has been relinquished either willingly or unwillingly.

One danger of executive privilege is often overlooked. It is often held that executive privilege is damaging to the Nation because important information that will aid the legislative process is withheld from the Congress. This is true; but invoking executive privilege is also damaging to the Executive. It insulates him from important questions concerning issues that can be raised by some 535 inquisitive Congressmen as well as the American people, when they are given access to information which is their right to have. The right to know is the very root of democracy. This is a right that must not be denied or diminished regardless of the findings that may be forthcoming in an investigation.

There is a great need that no branch of Government be free from investigation. This is especially true of the executive department because of the tremendous power and authority that reside in that institution. Some may argue that congressional investigations breed excess. This unfortunately has been true in a few cases in the past. But the tremendous assets that have resulted from past congressional hearings far outweigh the few excesses. We can be confident that the present Senate Select Committee, chaired by Senator Ervin,



will provide an indication of the benefit that can come from the right of Congress to investigate.

In conclusion, executive privilege is a myth with

no precedent in English parliamentary procedure or in the Constitution and Congress is "the highest grand jury in the land" with power to call anyone before it.

There is no real indication that an answer to the question before us will, or should, be placed before the courts. The question has already been settled by a long history of precedents, at least until the recent supererogation of power claimed by the executive department.

The real solution to this apparent dilemma must remain with Congress. Congress must reaffirm its legitimate constitutional powers. Imaginative legislative programs are necessary. Congressional leaders and members of the Congress must not create an image of confusion and despair by going off in innumerable diverse directions on important issues. The Congress must stop acquiescing to the executive department in matters of grave importance.

Only then can the course of action taken by Congress—based upon research, hearings, debate, and cooperation and a feeling of institutional loyalty—overcome the harsh, unreasonable, and frightening acquisition of power, under the guise of executive privilege to secrecy, that has occurred.

Mr. Chairman, as you requested, I would like to have my full statement placed in the record.

#### SCOPE OF CONGRESSIONAL ACCESS

Senator KENNEDY. I know that you are pressed for time, Senator Moss, but let me ask you, do you think there should be any limitation on the ability of Congress to require information from the Executive?

Senator Moss. The broad answer is, no. Congress has the responsibility to make inquiry into and oversee all actions of Government, executive as well as legislative. In certain instances where there is a need for secrecy, the burden is on the Executive to establish that need and the Congress must decide whether such a need exists on an ad hoc basis.

When we were debating this subject before and the allegation was made that the Executive would deny the appearance of any of his people, I argued very strongly, and I think according to law, that all individuals must appear if the Congress asks for their appearance. If a particular executive representative, feels he cannot make such an appearance because the matter to be discussed with the President, is of a particular secret or sensitive nature, then the Congress has to make a decision in that specific instance.

In other words, what I am trying to say is that we can't say absolutely that everything must be disclosed. There are certain national security matters that must perhaps be kept secret, but the Congress has to decide what that will be, and the burden of proof is on the Executive.

Senator KENNEDY. Is it your feeling that there is legislation needed in this area now to preserve what you appropriately identi-

fied as the relationship between the Congress and the Executive, with the ultimate determination to be made by the Congress and a recognition that the Congress ought to be able to withhold materials which are sensitive to national security? Is legislation essential to establish perhaps even the definitions that have been put forward by various administrations?

Senator Moss. I think, unfortunately, there is some legislation needed because of the drift that has been going on and has reached its peak under the present administration. Claims made by the Executive for secrecy and executive privilege, go far beyond the precedents that reach all the way back to the English House of Commons and have come steadily forward. It ought to be clear that the legislative branch, being the ultimate grand jury of this country, should have a right to request that anyone appear before it, including any member of the executive branch. Since this ultimate power has been denied, and several representatives of the executive department have referred to appear on a number of occasions now, apparently we need some legislation to make it positively clear that those precedents still apply under our Constitution and our system of Government.

#### PRESIDENTIAL APPEARANCE BEFORE CONGRESSIONAL COMMITTEES

Senator KENNEDY. Would you include the President in that executive branch definition about ultimate——

Senator Moss. Yes, I would. Ultimately the President should appear if he is invited by the legislative branch to appear.

It is true that the President has certain privileges that allow him to refuse to answer questions that he considers of an intimate or secret nature. But I don't think he has a right totally to say he will not come.

Senator KENNEDY. I was recently reviewing some of the precedents established by Presidents who have appeared before the Congress. Washington, Jefferson and Lincoln appeared involving different matters. I think, as a matter of fact, Lincoln appeared involving some communication allegedly between, I think, his wife and individuals who were sympathetic to the cause of the South. I was reading through Sandburg's description of that. Evidently Lincoln heard that a hearing was taking place and he just walked in at the opening of the hearing.

The members of the Senate extended the courtesy obviously of listening to a very brief description of his own personal denial of any kind of a wrongdoing; then he quietly got up and walked out and there was complete silence.

And then the committee adjourned for the day, they were so overwhelmed. But it seemed to end any kind of speculation by the Congress involving this incident.

Senator Moss. That is a very moving incident.

Senator KENNEDY. If you are interested, I will be glad to give you the reference. It is an enormously interesting and moving vignette of history.

Senator Moss. It would be so refreshing if the Executive felt that he could come and make an appearance and speak before a commit-

tee or Congress as a whole. Since the presidency of Woodrow Wilson and until this year, the President has appeared before a joint session and spoken in person. At least we have reached the point where the President generally will face the Congress.

Senator KENNEDY. Of course, this year I think he just issued—

Senator MOSS. Unfortunately President Nixon this year went back to issuing a written report. I had hoped that the precedent had been established by which closer cooperation between the Executive and the legislative.

Senator KENNEDY. Thank you very much, Senator Moss, for a very helpful commentary. Obviously you have given this a great deal of thought. We appreciate your appearance.

Senator MOSS. I appreciate the courtesy and I thank my colleague from Florida.

[Senator Moss' prepared statement follows:]

#### STATEMENT OF SENATOR FRANK E. MOSS ON EXECUTIVE PRIVILEGE AND CONGRESSIONAL INQUIRY

Mr. Chairman, I wish to address an issue that is the source of great controversy in the United States. It concerns the question over what is or should be the extent of executive privilege as it relates to Congressional inquiry. This question has been with us for as long as we have had executive and legislative bodies. But the problem is especially acute today because of recent allegations by member of the executive department that the right to withhold information can be all inclusive. Because of my great respect for and loyalty to the Congress of the United States, I feel a special obligation to voice my views on this subject. Unless a solution that asserts the proper role of the Congress to acquire information is found, government as we have known it may not continue.

An analysis of executive privilege and Congressional inquiry is complex. Major research has been done to support either side of the argument. The issue is difficult to resolve directly because no constitutional provision refers to executive privilege. In addition, statutory law or judicial decisions have provided no real clarification. As a result, ambiguity over the exact meaning of executive privilege has occurred. Such questions are asked as: Can executive privilege be invoked only by the President? Does executive privilege apply to cabinet members, the White House staff, or any civilian employed by the Executive Department? Can executive privilege be invoked to curtail the acquisition of information by Congress as a whole, a Congressional investigating committee, the news media, or the general public? I desire to examine executive privilege only as it applies to the right of Congressional inquiry.

In recent weeks, a confrontation of increasing proportions has grown between two separate and equal branches of government—the Executive and the Legislative—over this issue. If government is to be viable, a working relationship between these two branches of government must exist. Irresponsible statements emanating from certain executive officials have already created a most serious working atmosphere. Much information that is being given to Congress is given reluctantly. And often Congress cannot even get access to much needed information. If the Congress cannot get such information, a major impediment to sound legislation results. Thus, the executive body has a special responsibility to furnish all information asked by the Congress unless the national security clearly would be damaged. And the burden of proof of such damage must be on the executive department.

#### NIXON AND EXECUTIVE PRIVILEGE

It is interesting, but rather disturbing, to examine the evolution, if not outright change, in President Nixon's position regarding the right of the Chief Executive to invoke executive privilege. On April 22, 1948, Richard Nixon, as a Congressman from California, questioned, rather strongly, whether President Truman's refusal to furnish information for a congressional investigation was justified. Nixon said:



"The point has been made that the President of the United States has issued an order that none of this information can be released to the Congress and that, therefore, the Congress has no right to question the judgment of the President in making that decision. I say that the proposition cannot stand from a constitutional standpoint or on the basis of the merits for this very good reason: That would mean that the President could have arbitrarily issued an Executive order in the Meyers case, the Teapot Dome Case, or any other case denying the Congress of the United States information it needed to conduct an investigation of the executive department and the Congress would have no right to question his decision. Any such order of the President can be questioned by the Congress as to whether or not that order is justified on the merits."

On March 24, 1969 President Nixon apparently in agreement with the position of Presidents Kennedy and Johnson concerning executive privilege, gave further encouragement that secrecy in government would not be imposed without specific presidential approach. Included in a memorandum sent to Cabinet officers and Heads of Agencies was the following statement:

"The Policy of this administration is to comply to the fullest extent possible with Congressional requests for information. While the Executive Branch has the responsibility of withholding certain information the disclosure of which would be incompatible with the public interest, this Administration will invoke this authority in the most compelling circumstances and after a rigorous inquiry into the actual need for its exercise. For those reasons, Executive privilege will not be used without specific Presidential approval."

"On January 31, 1973, at a news conference, President Nixon gave additional encouragement:

"I will simply say the general attitude I have is to be as liberal as possible in terms of making people available to testify before the Congress, and we are not going to use executive privilege as a shield for conversations that might be just embarrassing to us, but that really don't deserve executive privilege."

And, as later as March 12, 1973, President Nixon asserted:

"Executive privilege will not be used as a shield to prevent embarrassing information from being made available but will be exercised only in those particular instances in which disclosures would harm the public interest."

Suddenly, however, as a result of the embarrassing news from Watergate, a changed attitude toward executive privilege seems to emanate from the White House. This attitude is found in former Attorney General Kleindienst's allegation that there is no limit to executive privilege. It is shocking that a representative of the president can assert repeatedly that the only curtailment upon a President's power is that imposed by public opinion and the electorate. Even more disturbing is the former Attorney General's statement that if you don't like the position taken by the President you can impeach him. For, "you don't need fact to impeach a President. . . . You don't need evidence to impeach a President. \* \* \*"

The former Attorney General clearly established a direct confrontation between the Congress and the President. This is unfortunate. In a democratic society there is need for communication and cooperation among the various branches of government. As a direct result of recent statements by Kleindienst that is now hampered.

Additional executive privilege guidelines were issued by the White House on May 3, 1973, with a supplement on May 4, ostensibly to give further clarification to the President's position. In reality, they appear to be only a response to pressure exerted on the Chief Executive in view of the certainty that a congressional investigation over Watergate would result.

The guidelines stated:

"The President desires that the invocation of Executive Privilege be held to a minimum. Specifically:

"1. Past and present members of the President's staff questioned by the FBI, the Ervin Committee, or a Grand Jury should invoke the privilege only in connection with conversations with the President, conversations among themselves (involving communication with the President) and as to Presidential papers. Presidential papers are all documents produced or received by the President or any member of the White House staff in connection with his official duties."

"2. Witnesses are restricted from testifying as to matters relating to national security not by executive privilege, but by laws prohibiting the disclo-

sure of classified information (e.g., some of the incidents which give rise to concern over leaks). The applicability of such laws should therefore be determined by each witness and his own counsel.

"3. White House Counsel will not be present at FBI interviews or at the Grand Jury, and, therefore, will not invoke the privilege in the first instance. If a dispute as to privilege arises between a witness and the FBI or the Grand Jury, the matter may be referred to White House Counsel for a statement of the President's position."

The supplement memorandum added:

"White House Counsel will be present at informal interviews of White House personnel by Ervin Committee Staff, but only for the purpose of observing and taking notes. Privilege will be invoked by White House Counsel, if at all, only in connection with formal hearings before the Ervin Committee."

President Nixon has not been entirely candid in his position on executive privilege. His actions speak far more loudly than his words. Repeatedly, in contradiction to his stated position, the President has made use of executive secrecy to hinder the Congress in its acquisition of information. No less than nineteen instances can be cited in which the President, or members of Executive Departments and Agencies, refused to provide documents, or information to Congressional committees or members of Congress during President Nixon's first term in office. Most recently, the President's attempt to prevent White House staff members to tell what they know about the Watergate scandal is just one addition to such celebrated cases as the attempting hushing in the Fitzgerald case.

The flip flops in the President's position on executive secrecy over some two decades, plus the differences between his statements and actions, demonstrate the ambiguity of the President on this subject. Recent statements by close presidential associates are frightening. It is inconceivable that the Congress can put any assurance in presidential statements on executive secrecy when such wide disparity exists between words by the President and/or staff members and their actions.

In addition, the President's May 3 memorandum assertion that executive privilege can be cited to prevent information from becoming public that involves conversations with the President may be questioned. No real justification can be provided for this position unless national security is at stake. It is just another means to prevent embarrassment for the Chief Executive for possible statements that he might make. Whether such a position is acceptable in a democratic society is questionable.

Because President Nixon is a former Congressman and Senator, his refusal to furnish necessary information to Congress is difficult to understand. He must know that due to the complexity of twentieth century legislation, it is impossible for a Senate and House staff that totals 4,676 and 8,295 respectively to compete in gathering information with a civilian staff of the executive department that numbers some 1,915,200. Justice Story's observation that the President has access to a great amount of information that the Congress does not have and the need to get that information to Congress is appropriate:

"The President must possess more extensive sources of information, as well in regard to domestic as foreign affairs, than can belong to the Congress. The true workings of the laws \*\*\* are more readily seen, and more constantly under the view of the executive \*\*\* There is great wisdom, therefore \*\*\* in requiring the President to lay before Congress all facts and information which may assist their deliberation \*\*\*"

Those who argue in favor of executive privilege base their argument on two portions of the Constitution. Article II, Sec. 1, states "The Executive power shall be vested in a President of the United States of America;" and Article II, Sec. 3, states "He shall take care that the laws be faithfully executed." Under these provisions of the Constitution the argument is given that due to the separation of powers doctrine, executive privilege can be invoked. An additional argument often cited by proponents of executive privilege is that "inherent" powers reside in the Presidency which allow him to withhold information from the legislature, judiciary, or public."

In regard to executive secrecy, the President, who often claims to be a student of history, as well as those who support him on this issue, have misread historical precedents as a basis for their arguments.

No one disputes that the President has certain supreme duties assigned to him by the Constitution. But one of them is not executive privilege as it is

currently used. Tradition and custom must remain the basis for the use of executive privilege by the executive department. And custom and usage refute the use of executive privilege more forcefully than it supports it.

#### HISTORY AND EXECUTIVE PRIVILEGE

Some may object to the notion that history can provide an answer to the question before us. They may assert that the complexity of the twentieth century prevents the use of precedent from the early years of our Republic as guidelines to current problems. But such objections do not appear to be entirely valid. History has been an aid in formulating answers to perplexing problems. It is a base on which we can build. As one writer points out, "the language of the Constitution cannot be interpreted safely" without such reference. Justice Holmes embellished this argument with his cogent observation: "A page of history is worth a volume of logic".

This does not mean that history is the only criteria to consider in the formulation of an answer to the question before us. Nor should logic be thrown to the wind. But history and logic should be put in proper perspective.

Something that is often forgotten is that Congress is also "supreme in the duties assigned to it by the Constitution; preeminent among which is the established power to investigate into executive conduct; and in light of history it might be argued with greater force that the executive cannot withhold that which Congress is authorized to require."

James Madison, Father of the Constitution and a major author of *The Federalist Papers*, in *Federalist* #51, maintained that "in Republican government the legislative authority necessarily predominates." This may not necessarily be the case. But the Congress ought to be at least the equal of the Executive. This can be achieved only if Congress has access to information which the President can and must provide.

Helpful to this analysis is a definitive article entitled "Executive Privilege vs Congressional Inquiry" by Professor Raoul Berger, Harvard Law Historian and an acknowledged authority on the subject. According to him, no historical evidence exists that executive privilege has ever been intended to mean a check on the legislative power of inquiry. This does not negate the fact that some things should be kept confidential because they are matters of extreme delicacy or deal with national security. However, this is the exception rather than the rule. Certainly, the executive privilege must not include a blanket approach to all executive information.

In looking at history, we find that the American Constitution, to a great extent, was based upon parliamentary and colonial political theory. The Constitution was the result of the application of this theory to the practical world in which the Founding Fathers found themselves. An exhaustive number of precedents to substantiate the need for congressional inquiry need not be cited. But, a representative sampling of political scholars and practitioners of the subject indicate the historical importance that has been placed on the right of Congress to get information.

English precedents for the right of legislative investigation were established in the 17th and 18th centuries in England. Members of the House of Commons, even during the most perilous of times, said that they had the right to delve into the administration conduct of the ministers "from the lowest to the highest". Even the opposition claimed that no individual could deny that "we have a Right to inquire into the conduct of our public affairs". This included bringing executive officers before the House for examination.

The Maryland Constitution of 1776 gave specific expression to the right of Congress to receive information by empowering the House to "call for all public official papers and records, and send for persons whom they may judge necessary in the course of inquiries concerning affairs relating to the public interest." But it should be noted, the practice of providing papers and records to state legislatures appeared to be common whether or not state constitutions provided a specific statement on the subject.

The right of congressional inquiry was firmly established by the First Legislature. In 1789, Alexander Hamilton drafted a provision, with the approval of President Washington, which was enacted by the First Congress. It stated:

"It shall be the duty of the Secretary of the Treasury \* \* \* to make report, and give information to either branch of the legislature in person or in writing, as may be required, respecting all matters referred to him by the Senate or House of Representatives, or which shall appertain to his office. \* \* \*"



Roger Sherman, who had been a member of the Constitutional Convention, specifically stated that Congress had to receive information from whatever source necessary. "As we want information to act upon, we must procure it where it is to be had; consequently we must get it out of this officer, and the best way of doing so must be by making it his duty to bring it forward."

In 1792 the House of Representatives appointed a Committee to investigate the military disaster suffered by General St. Clair. The Committee was authorized to "call for such persons, papers, and records as may be necessary to assist their inquiries." Furthermore, the House resolved, "That the President \*\*\* be requested \*\*\* to lay before this House such papers of a public nature, in the Executive Department as may be necessary to the investigation of the causes of the failures of the late expedition under Major General St. Clair." Some argue that the reasons why the information was furnished to the House is ambiguous. Did Washington allow the House access to the information because he felt compelled to do so, or because he saw no damage resulting from the information? The fact is that access to the information sought by the investigation body was not curtailed.

Thus, precedents were established early of the right of Congress to acquire information necessary for intelligent deliberation. In a 1927 United States Supreme Court case, *McGrain vs Daugherty*, Justice Van Devanter, speaking for the Court, held that Congress had the right to investigate. He stated:

"In actual legislative practice power to secure needed information by such (investigatory means) has long been treated as an attribute of the power to legislate. It was so regarded in the British Parliament and in the Colonial legislatures before the American Revolution; and a like view has prevailed and has been carried into effect in both Houses of Congress and in most of the State legislatures."

"This power was both asserted and exerted by the House of Representatives in 1792, when it appointed a select committee to inquire into the St. Clair expedition and authorized the committee to send for necessary persons, papers, and records."

Furthermore, the Court was of the opinion:

"that the power of inquiry—with the process to enforce it—is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in American legislatures before the Constitution was framed and ratified. Both Houses of Congress took this view of it early in their history. \*\*\* The Acts of 1798 and 1857, judged by their comprehensive terms, were intended to recognize the existence of this power in both Houses and to enable them to employ it more effectually than before."

The right of congressional inquiry was further strengthened by Attorney General Cushing's statement to President Pierce in 1854:

"By express provision of law, it is made the duty of the Secretary of the Treasury to communicate information to either House of Congress when desired; and it is practically and by legal implication the same with other secretaries, and with the Postmaster and the Attorney General."

And Woodrow Wilson, an astute political observer and later President of the United States, stated in 1885:

"Unless the Congress have and use every means of acquainting itself with the acts and disposition of the Administrative agents of the government, the country must be helpless to learn how it is being served. \* \* \*"

We can conclude that the power of Congress to investigate was established several times during the first century of our history in civil as well as military actions of the executive office. We must not assume that that power has been relinquished either willingly or unwillingly.

Proponents of executive privilege cite two seemingly convincing statements by two quite different 20th century Presidents. President William Howard Taft noted:

"The President is required by the Constitution from time to time to give to Congress information on the State of the Union, and to recommend for its consideration such measures as he shall judge necessary and expedient, but this does not enable Congress or either House of Congress to elicit from him confidential information which he has acquired for the purpose of enabling him to discharge his constitutional duties, if he does not deem the disclosure of such information purdrent or in the public interest."

And Teddy Roosevelt, when refusing a senatorial demand for information said:

"Heads of the executive departments are subject to the Constitution, and to the laws passed by the Congress in pursuance of the Constitution and to the directions of the President of the United States, but to no other direction whatever."

The above views were never implemented to the extent that anyone who worked for the executive department could invoke executive privilege. Whether this was because no occasion arose to do so, or because of no strong belief existed regarding them is moot. The statements imply that the President will be solely responsible for invoking executive privilege.

President Taft gave clarification when he issued Executive Order 1062 stating:

"In all cases where by resolution of the Senate or House of Representatives, a head of a Department is called upon to furnish information, he is hereby directed to comply with such resolution, except when, in his judgment, it is incompatible with the public interest, in which case he shall refer the matter to the President for his direction."

#### EXECUTIVE PRIVILEGE: EISENHOWER, KENNEDY AND JOHNSON

It is difficult to find any real use of executive privilege as a means to curtail congressional inquiry until the Eisenhower Administration. However, during the past two decades the issue has come to the forefront. On May 17, 1954, President Eisenhower, in a letter to a Secretary of Defense Charles Wilson, said subordinates could not be forced to appear before a special subcommittee of the Senate Government Operations Committee.

Eisenhower's Attorney General, William P. Rogers, picked up the theme and asserted that the "President was free to keep from view" certain portions of a letter that he deemed to be "confidential." He further asserted that the "President and Heads of Departments must and do have the last word."

President Kennedy, in response to a letter from Congressman John E. Moss, former Chairman of the House Subcommittee on Foreign Operations and Government Information, put ultimate responsibility on the President to invoke executive privilege. His letter of March 7, 1962, stated: "Executive privilege can be invoked only by the President and will not be used without specific Presidential approval."

And President Johnson, on April 2, 1965, in response to a letter from Chairman Moss, followed the Kennedy position by stating:

"Since assuming the Presidency, I have followed the policy laid down by President Kennedy in his letter of March 7, 1962, dealing with this subject. Thus, the claim of 'executive privilege' will continue to be made only by the President."

Former Attorney General Richard Kleindienst's recent provocative allegations that there is no limit to executive privilege not only go beyond William Rogers' statement that executive privilege provided "uncontrolled discretion" to withhold information by the executive department, but seemingly go beyond President Nixon's stated position.

#### POSSIBLE SOLUTIONS: THE COURTS

What can be done to clarify the question before us? One alternative is to submit the entire topic to the courts. De Tocqueville, a very astute 19th century observer of American politics, saw that "scarcely any political question arises \*\*\* that is not resolved, sooner or later, into a judicial question". Professor Berger argues that the courts would be the proper place for review of this subject. And even President Nixon, in his press conference on March 15, perhaps anticipating what the decision might be because of recent appointments to the Supreme Court, said: "Perhaps this is the time to have the highest court of the land make a definite decision with regard to this matter (executive privilege)."

At this time it does not appear that this question need or will go to the courts. Associate Justice Potter Stewart's private observation that the question concerning executive privilege "probably never will be brought before the Supreme Court" is an acceptable and realistic position.

#### DANGERS OF EXECUTIVE PRIVILEGE

For almost two centuries precedents have been established that give Congress broad investigatory powers. It has only been in the last two decades that



the executive department has attempted to curtail this "preeminent" power of the Congress. The power that has been used by the Executive in his claim of executive privilege is a very dangerous maneuver. We must be aware that "arbitrary power and the rule of the Constitution cannot both exist. They are antagonistic and incompatible forces; and one or the other must of necessity perish whenever they are brought in conflict."

Woodrow Wilson made a cogent statement on the danger of too much power in the hands of a few individuals. He said: "Concentration of power is what always precedes the destruction of human initiative and, therefore, of human energy." It is hoped that the Congress will use those prerogatives that are available in order that the possible destruction mentioned by Wilson can be averted. Perhaps the most important prerogative is that of gathering information from every possible source. Without such a right, and this involves broad investigatory powers, a possible destructive concentration of power can result in the executive department. This is especially evident due to the recent isolation of the President that has occurred. It is absolutely necessary that the branch of government that is closest to the people, the Congress, must protect the interests of the people. And nothing can be more destructive of those interests than secrecy in high places.

One danger of executive privilege is often overlooked. It is often held that executive privilege is damaging to the nation because important information that will aid in the legislative process is withheld from the Congress. This is true. But invoking executive privilege is also damaging to the Executive. It insulates him from important questions concerning issues that can be raised by some 535 inquisitive Congressmen, as well as the American people, when they are given access to information which it is their right to have.

There is a great need that no branch of government be free from investigation. This is especially true of the executive department because of the tremendous power and authority that reside in that institution. Some may argue that congressional investigations breed excess. This, unfortunately has been true in a few cases in the past. But the tremendous assets that have resulted from past congressional hearings far outweigh the few excesses.

We can be confident that the present Senate Select Committee, chaired by Senator Ervin, will provide an indication of the benefit that can come from the right of Congress to investigate. This is a right that must not be denied or diminished regardless of the findings that may be forthcoming. The right to know is the very root of democracy.

Edward Livingston, a significant early American lawyer and legislator, made an observation that is especially applicable:

"No nation ever yet found any inconvenience from too close an inspection into the conduct of its officers, but many have been brought to ruin, and reduced to slavery, by suffering gradual impositions and abuses, which were imperceptible, only because the means of publicity had not been secured."

And Judge Wyzanski furthered this theme by arguing that: "Congressional investigations are only one, if an extreme example, of our belief that exposure is the surest guard \*\*\* against official corruption and bureaucratic waste, inefficiency, and rigidity".

In 1951, the Massachusetts Supreme Court strongly rejected the claim of executive privilege:

"It is held here and in other jurisdictions that inasmuch as any legislative body, in order to carry out the objects of its existence, must have means of informing itself about subjects with which it may be called upon to deal, it has as an attribute of its legislative function power to summon witnesses and to compel them to attend and make disclosure of pertinent facts and documents \*\*\* The attempt of the Senate to secure such information as might be contained in the report was not in interference with the executive department of the government in violation of Art. 30 of the Declaration of Rights, relating to separation of powers \*\*\* It was a permissible exercise of an attribute pertaining to legislative power. If the legislative department were shut off in the manner proposed from access to the papers and records of executive and administration departments, boards and commissions, it could not properly perform its legislative functions".

Although the above advisory opinion is not binding on the Federal government, it is applicable to the questions before us.

## CONCLUSIONS

It appears that Professor Berger is correct in stating that Executive privilege is "a myth" with "no precedent in English parliamentary procedure in the Constitution and that Congress is 'the highest grand jury in the land' with power to call anyone before it."

There is no real indication that an answer to the question before us will, or should, be placed before the courts. The question has already been settled by a long history of precedents, at least until the recent supererogation of power claimed by the Executive Department.

The real solution to this apparent dilemma must remain with Congress. Congress must re-affirm its legitimate constitutional powers. Imaginative legislative programs are necessary. Congressional leaders and members of the Congress must not create an image of confusion and despair by going off in innumerable diverse directions on important issues. The Congress must stop acquiescing to the Executive Department in matters of grave importance.

Only then can the course of action taken by Congress—based upon research, hearings, debate, and cooperation, and a feeling of institutional loyalty overcome the harsh, unreasonable, and frightening acquisition of power, under the guise of executive privilege to secrecy, that has occurred.

Senator KENNEDY. Senator Chiles, we welcome you.

### STATEMENT OF HON. LAWTON CHILES, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator CHILES. Thank you, Mr. Chairman. I am delighted to be here this morning to offer my support for S. 1142, of which I am a co-sponsor. I believe a free and prompt flow of information from the Government to the people is essential if we are ever to achieve real citizen access to Government. The Washington executive agencies are essentially unaccountable to any electorate or constituency and it is especially important that the information flow is not stopped there. As you know, the Congress, in an effort to better ensure the flow of information, passed the Freedom of Information Act in 1966. Speaking very generally, the Freedom of Information Act's objectives eliminated the broad exemptive language including the requirement that a person must be directly and properly concerned in order to be entitled to see Government records. It tried to impose a burden of justifying non-disclosure upon the agency fielding the request, and it tried to promote the greater availability of certain classes of agency materials which are potential sources of law or policy.

Unfortunately, however, Government officials at all levels in many of these agencies have systematically and routinely violated both the purpose and specific provisions of this law. This was brought out well in the hearings held in the House last year by Congressman Moorhead. The occurrence of violations of the act on a regular basis violate the law's general purpose as well as its specific provisions.

When I first received Senator Muskie's letter explaining the provisions of his bill I was immediately struck with the similarity between it and a proposal I was about to offer myself. The Administrative Conference of the United States in their recommendation number 24 supplied me with the basic guidelines for my proposal. It included, as does the S. 1142, definite rules, time period specifications for responses and notification of appeals process, et cetera.

In an analysis done by Dr. Harold Relyea and Sharon Gressle of the Library of Congress it was found that the major Government

agencies took an average of 33 days to even respond to a request for public record under the Freedom of Information Act. And an average of 50 days to respond when the initial decision to withhold information was appealed by someone looking for facts.

There are, of course, exemptions specified in the Freedom of Information Act and these, in my view, ought certainly to continue to be applicable. There is general recognition that there are cases where matters are specifically required by Executive order to be kept secret in the interest of national defense or foreign policy, or matters specifically exempted from disclosure by statute: Trade secrets and commercial or financial information obtained from a person and privileged or confidential; personnel and medical files, etc. But information other than that included in these exemptions ought to be available to the public according to a standardized procedure. It makes absolutely no sense to have one agency operating under different guidelines than every other agency, and there surely ought to be a routine, established, fair way that requests are handled by the Federal agencies—a timetable during which the public can reasonably expect certain steps to be taken.

#### FREEDOM OF INFORMATION OFFICER PROPOSED

I believe Senator Muskie's bill will go a long way toward removing the unnecessary obstructions agencies have been putting in the way of citizens seeking information. I am happy to support this proposal strongly. I would, however, like to make one suggestion for amendment to the bill—a provision I had included in my own version which does not appear in S. 1142. That is, that the head of each agency designate an employee of that agency to receive and act upon requests for information, and that the name, title, and address of each employee so designated be published in the Federal Register and also made available to the public by any other means the head of the agency judges appropriate.

Senator KENNEDY. Let me ask you on this, is this the way it is done in Florida?

Senator CHILES. No. Actually in Florida the Sunshine Act that we are talking about primarily goes to opening up meetings. It is not as such a freedom of information act.

Senator KENNEDY. The question I have on just having one person designated in each of the departments would be whether he is going to be simply a rubber stamp to a decision that is made somewhere in the bureaucracy. Is he just going to rubber stamp the decision that is made in any one of a wide variety of offices within the agency or is he going to be a forceful figure in loosening up the material.

Senator CHILES. That may be a valid point but the alternative now is the shuffling process.

Senator KENNEDY. Right.

Senator CHILES. Everyone says that has to go to someone else.

Senator KENNEDY. Yes.

Senator CHILES. There will be no one to really handle the requests that come in. They will always be shuffled from one desk to another. At least you would know this is the guy that you deal with and when it comes to making an accounting, I think the Congress would



know this is the man that has been giving the dodge or he has been failing to respond and we could call him up.

Now, it is this nameless, faceless agency and everyone says, you mean we didn't give that information?

Senator KENNEDY. Right.

Senator CHILES. We had to listen for days in Senator Montoya's hearings with Internal Revenue to some people that had systematically been trying to obtain some information just having to do with some procedures—how the Government dealt with specific fraud cases—and they were just given the runaround. When we were questioning people in the Internal Revenue, the Commissioner and other people said, we can't imagine that that happened. Who was responsible for that?

Senator KENNEDY. Well, now, one of the suggestions that I made in my opening statement here today is that we require the publication of any individual who makes the designation in limitation of material granting requests. So if you are making the request of the Bureau of Indian Affairs for a particular piece of information, if the request is denied, the person who makes the decision has his name placed on the public record.

Senator CHILES. I think that would be beneficial.

Senator KENNEDY. I think what we are driving at is the same kind of thing. They are not inconsistent. I agree with you there should be accountability. The advantage of having one person in the agency obviously it has the attraction of his being able to come up before the Congress and his record evaluated. He knows the responsibility is his, versus someone else in the depths of the Department who is not identified and will never have to take any public responsibility on the matter.

Senator CHILES. I agree with you. I think having the person that makes that decision flushed out and his name known would also be good and that was part of the direction of the amendment that we are talking about.

Senator KENNEDY. I see.

Senator CHILES. Just in summarizing, I think the need for a bill like S. 1142 is plainly evident. Such legislation is overdue. The Freedom of Information Act was undoubtedly milestone legislation. It reversed longstanding Government information policies and customs. It was a statement of congressional policy that any person would have clear access to identifiable agency records without having to state a reason for wanting the information. But as it stands, the law is simply inadequate. Really the law has just floundered in spite of the congressional policy that has been announced and that is what I think the Freedom of Information Act did, announced the public policy on the question. We see it just simply has not been complied with and in most instances it is how the information is denied rather than the fact that the public actually has any kind of real access to the information. For that reason I think we definitely need to pass legislation in this area.

#### PLACING BURDENS ON THE GOVERNMENT

Senator KENNEDY. A very good statement.

How do you react to the observation made that the requirements we would impose on agencies by this legislation would place another

burden on the agency and is going to be costly, going to be timely, and going to draw people away from other responsibilities. If we really open government up, it is going to be wide open to every rinky-dink request from anyone and the result is like pouring sand in the machinery of administration?

Senator CHILES. Well, I think at first we would have to determine is that a really valid reason? Is that really going to develop that way or is that an excuse?

Most of the agency heads that I have heard testify before the Congress, if you listen to them very long, you quickly understand that they really just don't think the public should be entitled to this information and they keep saying—they don't need this information. And so they go right back to before the 1966 Freedom of Information Act and I think that is their thinking.

That line runs almost through every agency head that I have heard testify or speak on the subject.

That is the same kind of information that I heard on the floor of the Senate and other places about whether we should open up our committee meetings. They said you just can't operate that way. Someone will be making speeches for the press all the time. You will never get a bill marked up. And I heard those excuses again. They were used over and over in Florida at the time we were talking about passing the Sunshine legislation. But I have yet to hear some agency head come in and say X number of hours of my agency were taken up in having furnished these requests and this has handicapped us. It is always the imagined fear of what is going to happen.

I think in most instances the public is not going to harass them. Who is going to want the information? It is more the idea that it is available, that it is open, and if it becomes a burden, then I think they can put some reasonable requirements on time, on the cost of some of this information. But as you see again from some of the testimony when the New York Times was trying to obtain some of the information and requests of some—in declassifying some of the information that was marked secret, and you see some of the cost that came back on that, and again this couple I mentioned before that was trying to receive information from IRS, they were charging tremendous things for copying on one page which would—these people spent thousands of dollars copying some things, which was just a completely unreasonable charge on that.

So I think that is really just more of a smokescreen than it is a real charge.

Senator KENNEDY. If they need more people to do it, do you think the Congress ought to make them available to them?

Senator CHILES. I think so. I think again no one has ever been able to say that the kind of Government we purport to have is the most economical or that it is to be the most efficient. But when we look at the polls and we—

Senator KENNEDY. When you look at the alternatives.

Senator CHILES. That is right. What are the tradeoffs on the other side, and then what is the price that we are paying for the latest findings in the Harris Poll that 79 percent of the people have no confidence, don't have any confidence in their Congress or their exec-

utive branch and that some 28 percent of the people have confidence in the court system, what is the price that we are paying for that?

Our system has to work on a volunteer basis. That is the only basis upon which we work today, and what happens when that 78 or 79 percent of the people say we are not going to go along any longer? I don't know what we would do about collecting our taxes or enforcing our laws or anything else when we reach that point.

Senator KENNEDY. One of the proposals I made in the opening statement was that we might consider having the Administrative Conference—an independent agency—review the denials to information by various agencies. Obviously the final decision would still be in the courts.

The Administrative Conference has a very broad spectrum of membership and knowledge and understanding of the whole administrative process, and we might try to move questionable decisions into the jurisdiction of this kind of an agency, get their input.

Senator CHILES. Well, that suggestion might even be a protection to these agencies who say they would be unduly burdened because then if this agency felt that some of these requests you know, would amount to harassment and that they were serving no useful purpose, that kind of situation might even be to their benefit.

I think that this might have some benefit to us in Congress—it is awfully hard to really get Congress' attention on this unless a situation becomes very, very bad. Look how many years it has taken since 1966 and the Freedom of Information Act has never worked properly. The people that have tried to get anything from it have been trying to make Congress realize that since 1966. But it is only when it came up to this kind of crisis between the executive branch and the Congress and executive privilege and all of these things that the Congress is finally willing to take a look at it.

So there really needs to be something for the citizen in those years during which Congress doesn't consider it to be such a great crisis.

#### EXECUTIVE PRIVILEGE

Senator KENNEDY. You know, you take a look at the President's statement, I believe it was in March of 1969, on executive privilege. It was a commendable statement—

Senator CHILES. Absolutely.

Senator KENNEDY [continuing]. To the various agencies about the exercise of executive privilege, and I think that there was at least some hope in the early times that that would in fact be Governmental policy. But I think everyone of us has seen instances where, of course, it was really just a sham.

Senator CHILES. Well, that is right, in the study that Senator Ervin and the information he is trying to compile, it seems that there really was no change from the time that statement was made and we find all kinds of denials of information to the Congress. The procedure that the President said would be followed—that executive privilege would only be claimed by the Chief Executive in writing—was not followed. We see that just didn't happen at all.

Senator KENNEDY. A very arbitrary exercise of power. I can remember when Attorney General Kleindienst sat in the room. We re-



requested information relating to the Kent State situation, information given to the Scranton Commission which had been reviewing civil disturbances. There were parents of children killed at Kent State who wanted to have access to the material. And Mr. Kleindienst finally said "I am not taking executive privilege. I am just not going to make the material available." That was all he said. We asked what is the basis for the decision, and he said I am just not going to make it available to you.

The harshness and the arbitrariness of this comment dramatized how dangerous that uncontrolled secrecy can be.

Senator CHILES. Well, again, that just goes to the rationale of thinking that we see that prevails. Certainly perhaps there was some basis of it prior to 1966 but Congress did speak to the public policy question and I think the Constitution really spoke to that policy long before that, that ours is a Government that really should be open in every instance except when there is some really national reason, national interest reason, why some information should be denied, and not on the theory that so many people want to take or the other rationale that you just don't need to know, or this is in my province to determine whether you need to know or not.

Senator KENNEDY. Very good. Well, I want to thank you very much, Senator Chiles. Your remarks are very helpful. We might make that Florida Sunshine Act a part of the record. It should be useful in terms of our total consideration of issues relating to secrecy and openness in Government.

Senator CHILES. It is a very short act. It won't take much room in the record. We will be happy to submit it.

Senator KENNEDY. Thank you very much.

[The material referred to follows:]

*286.011 Public meetings and records; public inspection; penalties*

(1) All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation or any political subdivision, except as otherwise provided in the constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, regulation or formal action shall be considered binding except as taken or made at such meeting.

(2) The minutes of a meeting of any such board or commission of any such state agency or authority shall be promptly recorded and such records shall be open to public inspection. The circuit courts of this state shall have jurisdiction to issue injunctions to enforce the purposes of this section upon application by any citizens of this state.

(3) Any person who is a member of a board or commission or of any state agency or authority of any county, municipal corporation or any political subdivision who violates the provisions of this section by attending a meeting not held in accordance with the provisions hereof is guilty of a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083. Amended by Laws 1967, c. 67-356, § 1; Laws 1971, c. 71-136, § 159, eff. Jan. 1, 1972.

Senator KENNEDY. Our next witness will come in a panel representing various media groups: Courtney Sheldon, Theodore Koop, and Fred Behringer.

Mr. Sheldon is the Freedom of Information chairman for Sigma Delta Chi, the journalistic fraternity, and also covers the White House for the Christian Science Monitor, which we sometimes think of as a sort of a national hometown newspaper in Massachusetts. Mr. Sheldon is here today representing the Joint Media Committee.

Mr. Koop is a retired vice president of CBS, and is presently the Washington director of the Radio Television News Directors Association.

Mr. Behringer is the vice president and executive editor of the Montgomery newspapers in Fort Washington, Pa. He is a past president of the Pennsylvania Society of Newspaper Editors, and serves on the Freedom of Information Committee for the Greater Philadelphia Chapter of Sigma Delta Chi, and also on the National Newspapers Association's Freedom of Information Committee.

Mr. Sheldon we welcome you first. We understand you are pressed for time. We will start with you.

## **STATEMENT OF COURTNEY SHELTON, JOINT MEDIA COMMITTEE AND SIGMA DELTA CHI**

Mr. SHELTON. Thank you. I appreciate the opportunity to testify this morning on a subject which is crucial to our daily activities. I come to you from the press battles at the White House and I was most encouraged to hear Senator Kennedy's comments about somehow trying to make the Freedom of Information Act practical for use by White House correspondents.

### **INFORMATION FROM THE WHITE HOUSE**

It is a terribly intricate, difficult, constitutional area and I don't know as I see the way through, but I think it is most useful to bring the subject out into the open at this particular time.

Now, most of us in the press corps are very grateful that the FOI Act exists even though we have made somewhat limited use of it. There are a few valuable precedents that have been set in forcing information from the clutches of the Government and even when we do not use it, because of time factors, money factors, bureaucratic factors of our own, the fact that it is there does have an impact on the climate in which we have to work daily.

But in the White House I would have to say that FOI has a negligible impression. Most of us are confident that if there were not exceptions in the act, which of course there are, that the White House would find them or originate them on the spot.

We are constantly asking White House officials for information which would be routinely dispensed in other places but here we are dealing with the President and his authority and the FOI Act is no match for the President's claim of executive privilege.

During this whole Watergate affair we can't get such information as who saw the President, who even sends documents into him, so say nothing of what is in those documents.

It is quite obvious that it would be extremely difficult if not impossible at this time to amend the FOI Act to give correspondents much more help in this respect. The White House argument in behalf of separation of powers and executive privilege is made very strongly and while Congress, of course, does contest it, it doesn't do this frontally at this time.

But there may be ways of crystalizing the issue in advance of that and who knows, we might someday have a President who truly believes in an open White House and an open Government.



At an early part of his campaign, Senator McGovern was talking about holding Cabinet meetings with the press in attendance. Now, suppressed and defeated as we are today in the Press Corps, such an event seems almost beyond imagination.

Many officials seem to have different ideas about freedom of information when they are securely in office and Mr. Nixon once talked very highmindedly about an open Government, and yet today the barn door is closed and every crevice is crammed with caulking. The table is turned on us and it is the phones of newsmen which are tapped.

The specific amendments that have been proposed for the FOI Act are very much to the liking of those of us in the press. They would reduce the amount of time that we would have to wait before litigation rewards us with the documents and information we want. But I don't underestimate what a changed climate can do for us. The climate until Watergate was stifling at the White House and I would have to say that despite the very few breaths of fresh air here and there, no one has really turned on the air conditioners and I am not terribly hopeful for the future. I find no one to blame for this really except the President. It has been his policy during the last 4½ years to severely restrict the flow of news to the public and to manage it when it is finally set loose.

I do not discount the need for White House secrecy but it is grossly overdone, and many times for political purposes having nothing to do with security. President Nixon has all but killed off the press conference. His record is abysmal compared to that of every modern day President. His average is one every 2 months and other Presidents held them two or three times each month. He has not held a press conference since March 15.

Seldom in the history of this country has there been more need for a press conference and for the President to answer questions which are on the public's mind, not just on the press' mind, Sigma Delta Chi 3 weeks ago recommended an hour-long televised press conference on nothing but Watergate.

Now, not all of my colleagues agree with me on what I am going to say now, but I am convinced that if President Nixon had held press conferences regularly and he had been forced to account for White House activities, we would not be in the mess that we are now in in Watergate. Even on such matters as the plumbers' team which was known in a vague sort of way a long time ago, someone might have asked about that, put it on the spot, possibly found out who was on it, and Liddy and Hunt might have been so exposed to the public view at that time that their subsequent Watergate venture would have been impossible.

Those close to the President's office adopted the President's style of secrecy and aggressive use of White House power. There is a new team at the White House as of today but we will have to see if its performance in freedom of information is really different. The Ziegler operation remains intact.

Now, there was one exchange between reporters and Mr. Ziegler last fall just before the election which illustrates what we are up against on a daily basis and hopefully it might give someone ideas on how to give us relief. At that time it was determined by sources outside of the White House that Donald Segretti was in frequent

telephone contact with Dwight Chapin, an aide in H. R. Haldeman's office when reporters pressed to have Mr. Chapin come forward and be interviewed this failed as it usually does in these circumstances. What is clear now was clear then, that Mr. Segretti and Mr. Chapin acting for the White House had engaged in political espionage in behalf of Mr. Nixon.

Mr. Ziegler stepped forward with a statement that charges were fundamentally inaccurate. It was a coverup story that lasted until the most recent disclosures. Last fall when reporters tried to get Mr. Ziegler to say just what was accurate and what was inaccurate about the report on Chapin and Segretti, he stonewalled. So one reporter asked if there was any record of phone calls to Mr. Chapin from Mr. Segretti. Mr. Ziegler didn't know anything about them. Mr. Ziegler was then asked if the White House switchboard would give such information if asked. I would hope not, said Mr. Ziegler, and there the matter ends.

Many of us rush from one event to another. There doesn't seem time to even consider whether such a withholding of news is justified under one of the various exemptions of the FOI Act and we simply try to get the information in other ways.

The Chapin phone incident wouldn't seem to come under the exceptions of the FOI Act, foreign policy, national security, trade secrets, or even internal personnel rules, and who can be sure what the administration would claim if it were asked?

Now, asking Mr. Ziegler questions about what the President thinks or knows is one of the most frustrating exercises in Washington. He does what he is asked to do, not just what the Ehrlichman's and the Haldeman's tell him to do, but the President himself. Mr. Ziegler very seldom says I don't know but I will find out. He just stonewalls.

The President sets the climate for Government and freedom-of-information matters as on everything else. If the Freedom of Information Act is not working as well as it should, it is because in certain measure the President really isn't interested in having it more effective.

As time goes on in this Watergate atmosphere, it may, just may, be possible for the leopards to change their spots. Anyway, we are most grateful that your committee and also committees in the House are looking into this matter once more and we are thankful for the contributions that have been made toward freedom of information by Congress in recent years.

Senator KENNEDY. Very good. How is your time, Mr. Sheldon?

Mr. SHIELDON. Well, I am better off than I thought when I looked at your list.

Senator KENNEDY. I have some questions. Can we hear from the others?

Mr. SHIELDON. Surely.

Senator KENNEDY. Very good. Mr. Koop.

#### STATEMENT OF MR. THEODORE KOOP, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION

Mr. Koop. Mr. Chairman, I am Theodore Koop, the director of the Washington office and a past president of the Radio Television

News Directors Association. The organization which has 1,000 members, is a member of the Joint Media Committee for which Mr. Sheldon just spoke, and we should like to associate ourselves with his testimony. But in addition we felt the pending legislation is so important that we wanted to express our own support for prompt enactment of S. 1142.

We believe there are two compelling reasons for passing this legislation. First, 7 years' experience with the act has demonstrated that it is not perfect. That is not surprising, I have no doubt much legislation could be improved in the light of its operation. Procedures for disclosure of Government records have been slow, complex and often expensive. Moreover, Government officials who may not wholeheartedly believe in the act have been able to ensnarl some requests for information in a mass of bureaucratic red tape. The not infrequent result has been to discourage newsmen and others from pursuing legitimate requests as vigorously as might be required. In short, the act needs sharper teeth if it is to be fully effective in opening Federal records to the public. It also needs a better spirit of compliance within Government agencies.

Second, I suggest that the pending amendments to the Freedom of Information Act are only one aspect of the need to counteract the sinister and growing penchant for secrecy in Government. The executive branch appears increasingly to try to withhold from the American people information they must have in order to cope with major problems and proposed Federal programs. For the public not only must be able to inspect detailed files but also to receive full and continuing knowledge of current events and future plans. This basic concept of our democratic process, however, is being thwarted and frustrated by over-classification of official documents, by the failure of high officials to hold frequent news conferences, and by obvious decisions to disclose a minimum instead of a maximum of information.

Certainly the enactment of S. 1142 in itself will not correct this worrisome situation. But it could serve as a stout expression of Congressional dissent from the general policy of secrecy: In effect, we hope this action will notify officials that in refusing to tolerate dilatory and obstructive administration of the Freedom of Information Act, Congress also objects to keeping from the public all information to which it is entitled. And both require a broad rather than a narrow interpretation.

#### NEWSMEN AND THE FOIA

There are several provisions of S. 1142 which particularly appeal to newsmen. The first is the setting of time limits in which an agency can refuse to provide requested records. Of course, even the time limits—10 days for the primary decision, 20 days for filing an appeal, and 20 more days for a second decision—can add up to a delay of some 2 months. For reporters who are accustomed to handling information promptly, that is a long time. We agree, though, that it is a highly desirable schedule.

Another provision which we endorse would enable courts to make a fresh examination of contested records, in order to determine



whether they could be properly withheld under any of the act's exemptions. We believe this is particularly important when the records concern national defense or foreign policy. In such cases the sweeping claim of national security is often misused to hide errors, embarrassment, or outright politics. The most careful study of such contentions is necessary of the Government is not to make a mockery of the right to know.

We consider entirely proper section 1(e) which permits courts to assess costs against the Government when it has lost its attempt to withhold access to certain records. The appeal process can become so costly that in many cases a small media company or an individual would have to drop the appeal. Only the most affluent organizations might decide to challenge the Government in courts.

Senator KENNEDY. Could we legislate more uniformly Federal schedules on the costs?

Mr. KOOP. I don't know whether you want to put such a schedule into the actual law but certainly it should be minimal, it seems to me, because there have been serious complaints about the cost of getting records, let alone the cost of appeal.

Senator KENNEDY. Should it depend whether it is, you know, a Grumman Aircraft asking the Renegotiation Board, or some doctors who are trying to get some material out of HEW, or the independent newsman trying to get some records? How do we go about this? Should we permit greater kinds of flexibility to the courts themselves about awarding attorneys fees?

Mr. KOOP. Are you referring to the suggestion that has been made of an intermediary step of the Administrative Conference or some other agency?

Senator KENNEDY. No, I was thinking here of the area of cost—what kind of procedures we are going to set up so it doesn't become the kind of burden that you have outlined here on an individual newsman, without having the Government necessarily underwriting major corporations contesting sizable contracts.

Mr. KOOP. Perhaps there can be a minimum of, just offhand, say, 10 free pages and a small fee to cover the cost of xeroxing anything further than that.

Section 4 is commendable because it requires annual reports from each agency on its decisions under the Freedom of Information Act. These reports would inevitably make clear which agencies were complying freely and which were dragging their feet. The resulting publicity should improve results in the following year, particularly if congressional oversight becomes active. I should like to say that if one official in an agency is designated as its chief decisionmaking officer in this field I would recommend it be the Director of Public Information because certainly he would have greater knowledge of the needs of the press and public and perhaps, too, greater sympathy toward such needs.

I should like to make one further comment that does not specifically concern pending amendments, but which I consider important for the legislative history. Broadcast newsmen naturally think in terms of audio and visual material as well as the printed word. We want it to be clear, therefore, that records to be made public under the Freedom of Information Act include films, tapes, photographs,

charts, and any other audio and visual material as well as typewritten, mimeographed and printed documents. So far we have no complaint on this point, but we want to make sure that no official denies disclosure because of any possible misinterpretation of the nature of an official record. Let us not overlook the interests and needs of electronic journalism.

Mr. Chairman, RTNDA is happy to join this Subcommittee in its quest for completely open Government. The public business must be conducted in a goldfish bowl, no matter how distasteful this might be to officials seeking to operate in comparative privacy. The proposals before you, if enacted, will constitute a vital step toward our mutual goal of keeping the United States the best-informed Nation in the world.

Thank you.

Senator KENNEDY. Thank you very much. I think particularly this last suggestion is a very useful, excellent one.

I have some questions for you but we will hear Mr. Behringer.

### STATEMENT OF FRED BEHRINGER, NATIONAL NEWSPAPER ASSOCIATION

Mr. BEHRINGER. Thank you, Mr. Chairman.

I am Fred Behringer. I am with Montgomery Newspapers in Pennsylvania. We publish two daily newspapers and 10 weeklies.

This morning I am here as a representative of the National Newspaper Association Freedom of Information Committee. Our executive vice president, Ted Serrill, and our corporate secretary and general counsel, Bill Muller, are with me this morning.

The National Newspapers Association is the official representative of the 8,500—

Senator KENNEDY. Do they want to be identified? Are they here? Which is which?

Mr. SERRILL. Serrill.

Mr. MULLER. I am Muller.

Mr. BEHRINGER. NNA is the representative of 8,500 community or small town newspapers in the country and with your permission, I will be glad to summarize the statement we have this morning and present the full statement for the record.

Senator KENNEDY. It will be printed in its entirety in the record.

Mr. BEHRINGER. Our association has long been concerned in this effort. The idea for a Freedom of Information Center at the University of Missouri first came from one of our meetings. And we have been directly involved not only in the efforts to improve the FOI Act but also to develop the act in the first place.

We are very pleased to note that all the fears about the problems the act might create have been groundless and while it is no doubt not as effective or as useful as it might be, the atmosphere that it has helped to create in many cases has been extremely helpful to us.

Open information on the Federal level is a growing matter of concern to small newspapers because as the population grows, we get many more Federal offices in our communities and as our home newspaper staffs grow we get many more opportunities to pursue the investigative kinds of story that we have been restricted from pursuing in the past.

Because of our growing concern about Federal information, we are also seriously concerned about the difficulty in using the act as it now exists because of several specific problem areas, and they have been well covered in Congressman Moorhead's subcommittee's report and other statements here. Of course, they include the amount of time it takes to get answers from Federal agencies, the excessive charges by these agencies in providing information, the cumbersome and costly legal efforts needed to appeal a denial of information, also the necessity of requesting an identifiable record, and the vague and broad areas of exemptions which could well be clarified in the amendments.

If NNA places emphasis on the high cost of pursuing the FOI Act it is because we do represent small papers and it is this special burden that prompts them to pursue the legal remedies for the Freedom of Information Act.

The value of the free access to information has never been clearer than it is today. While some might invoke a shield of national security to explain away something like a Watergate affair, this defense is really a red herring. The crisis has arisen not over the need for secrecy but because of the abuse of Government secrecy. It has become quite apparent from developments such as the Pentagon Papers case that much Government information that is classified should not be. These developments give a depressing insight into Government's instinct for secrecy and the consequences of this instinct. So in this atmosphere we feel it is highly appropriate and encouraging that your subcommittee is interested in improving the FOI Act.

We strongly support your efforts and the recommendations incorporated in S. 1142.

On the surface the recommendations you have included in your statement this morning would further tighten some of the loopholes which present problems for us.

I might add that we recognize a clear need in our own profession to better educate newsmen and newswomen to use the act effectively. We have been somewhat lax in this regard. But we do promise the full cooperation of NNA in working for enactment of these amendments and we appreciate very much the opportunity to be heard this morning.

Thank you.

Senator KENNEDY. Thank you very much.

Mr. Behringer, one of the suggestions that was made this morning by Senator Chiles is that, in an effort to try and focus some kind of responsibility, we ought to have an individual in the Government agency who is identifiable in exercising the responsibilities to supply information under a request.

Now, how do you react to that? I mean, as representing a group of smaller newspapers, wouldn't this require that anytime they ran into a stone wall at the regional office with regard to requests, they would have to come down here to Washington to talk to somebody down here?

Mr. BEHRINGER. Mr. Chairman, on the surfaces, I think it would make it much more cumbersome, not only in dealing with a local office but within some of the larger agencies in Washington itself.



Senator KENNEDY. In my opening statement I talked about having the individual who is involved in the decision be identified as a matter of public record. So if you made the request of the agency, and they denied it, the individuals in that agency who were involved are going to be named on the public record. Do you think that would be more useful or helpful as far as accountability?

Mr. BEHRINGER. I think that step along with the step Mr. Koop mentioned of greater involvement of the public information people in the agencies, the two combined would make for greater accountability, yes.

Senator KENNEDY. Let me ask you, Mr. Sheldon, do you think the Freedom of Information Act ought to apply to the White House?

Mr. SHELDON. I certainly do but I can't think of how to do it. I just don't see the—

Senator KENNEDY. And not have it vetoed?

Mr. SHELDON. Well—

Senator KENNEDY. You mean the constitutional question?

Mr. SHELDON. Constitutionally. The people that come out and are willing to speak at the White House are speaking for the President. The President has made that clear. Most Presidents have. They are not speaking on their own. They have the full cloak of presidential power in most instances and that seems certainly to extend all the way down to telephone calls to very lesser officials.

I find it very difficult to get at this problem from the White House standpoint and certainly Congress is finding it difficult questioning the President. The press has no official standing. Congress has an official standing and they can't seem to get the information that they need. We have no basis for legislating press conferences that I know of.

I think we are in a very, very difficult area. I think particularly at this time it is worth discussing a lot more than it has been. We have been very defeated. But I am afraid I don't have the specific avenue at this point to do it.

#### NEWSMEN AND THE FOIA

Senator KENNEDY. Why don't newsmen generally use the Freedom of Information Act more? Is it the question of cost or time or is it that they are not interested in beginning to wrestle around with some of these agencies because they are going to have to do business with them in the future? What do you think are really the principal reasons that newsmen generally haven't taken advantage of the act and how can that be remedied?

Mr. SHELDON. Well, you mentioned the two main factors, cost and time. Larger organizations do have the money to do this. I think as time goes on you will see it being used more because most news media are doing more investigatory reporting. When you are not doing that, and you are working on a deadline basis, even a week or 2 weeks, it is very difficult to use this act at this moment to get information that you need in a hurry.

I think there is another aspect of it, too. The use of this act depends upon the home office in the sense that the real bureaucratic side of it has to be done, has to be approved and initiated, and I

think in a lot of instances the home offices aren't as much aware of the opportunities of it as they should be. The correspondents down here are as harrassed and as busy as any profession. They are not very anxious to get into litigation. They will try every other means to get the news short of the FOI, and having said that, it has been used I know, by some news agencies. Associated Press and others I know have used it, and they have been very glad to have had that support back of them.

But I guess I have to go back to the feeling that what is at issue here largely in freedom of information is that we do not—there are not instructions on high to make FOI work the way we would like it to work. Actually there would be no need for rules if it is fully understood that the Federal Government was to be more responsive to not just the requests of newsmen but citizens and groups of all kinds.

#### NEWSMEN'S PRIVILEGE

Senator KENNEDY. Mr. Sheldon, one of the matters which I have been very much interested in is the newsmen's privilege area. I know how active you have been and how helpful you have been to us in the Congress. I am not sure there is a general consensus in the Congress yet for an absolute privilege. I am just wondering whether there is anything that you want to mention here this morning on that, whether we would be better off with no bill at all rather than a bill that doesn't provide the kind of absolute privilege which you feel is so essential?

Mr. SHELDON. Yes; I think you have seen, and it is evident certainly within the profession, that many of us now have trended toward feeling that either absolute bill is necessary, absolute privilege, or most of us now feeling that we would prefer to fight it out with the guarantees that we have in the Constitution through the courts.

When you analyze it, we lost the *Caldwell* decision by a 5 to 4 vote. Up until that time we felt that the confidentiality of sources was ours and it is the *Caldwell* decision which upset that. If we do have to go back to relying on the courts, I think our only hope really is that the composition of the court in time will be changed back to what it was and what I would say, what the Founders of the country wanted it to be, and our rights would be truly guaranteed. But there really is a very large problem in writing this law to give us what the Constitution really gave us in a very broad way because once you start to shave it off here or there, to write one restriction in, that may seem very innocent, but the interpretation of it by the courts, by officials, and then the temptation to add another is very great.

I would say on the whole that unless we are going to get something very absolute, a lot of us are feeling these days we are better off just as we are.

Senator KENNEDY. I don't know whether you saw this morning's Washington Post about the Voice of America curb on broadcasting of the Watergate?

Mr. SERRILL. Yes; I did.

Senator KENNEDY. Do any of you gentlemen want to give us a reaction to that?



Mr. SERRILL. Well, I had a very negative reaction. I think it is most unfortunate that the Voice of America can't report the news to other countries irrespective of source, irrespective of controversy. There seems to me no reason why when the VOA goes on the air it can't point out what is hearsay and what is not hearsay, but to deny information to audiences abroad that everyone in this country has and is making judgments on I think is most unfortunate and very misleading.

Mr. KOOP. Mr. Chairman. If I may add a sentence, it seems to me the VOA could lose credibility entirely over this issue.

Senator KENNEDY. Mr. Koop, one of the points that you made is the importance of timely response for newsmen in obtaining various information. The agencies often tell us that it is extremely difficult to locate documents which may be in their field office or record centers and that the 10 days to suit the press is simply too short for the Government.

If Congress sets a short deadline for the agency response, should we write in specific exceptions for certain cases or shall we leave the request to go to court after the initial period?

Mr. KOOP. My general feeling on exceptions in any law is that they sometimes provide a loophole so big that they don't amount to a thing. It seems to me the more exceptions you would have, the more difficult the act would be to administer. I think the simplest thing is to make a strict law and then if necessary, let the agency and individualicker if something is very complicated. I think if the individual applying realizes that it was a complicated matter, he would be inclined to be a little lenient with the agency.

Senator KENNEDY. Mr. Behringer, did you have much to do with Mr. Klein, the White House communications director, or did any of you gentlemen attempt to try to get his intercession in an area where the Freedom of Information Act might apply, to see if he would help in opening up the agency. What impressions could you give to us on any kind of action that he took or could take to help assist the press in this area?

Mr. BEHRINGER. I think Mr. Sheldon would be much closer to that.

Mr. SHELDON. Well, I am but I am not.

I think that his activities mostly were directed at the home town offices of the newspapers. He did not have direct—well, that is not quite right. He didn't have continuing contact with those of us in the local press corps. I think that in a lot of instances he may have been useful in pressing requests, particularly from the home town or from our home offices, in a whole variety of areas. He also helped set up certain kinds of briefings which were helpful to us here.

On the whole I would have to say that while Mr. Klein is a very able newspaperman, he nevertheless was working for an administration which was not sympathetic to newsmen's needs and that by and large his thinking as expressed while he was here was totally that of Mr. Nixon.

Senator KENNEDY. I saw yesterday, Mr. Koop, the CBS decision not to have immediate analysis of Presidential statements. Do you have any reaction to that? Is the network caving in to White House pressures? They have objected to this type of instant analysis.

Mr. Koop. Mr. Chairman, I should say first that being retired from CBS I am not currently privy to its thoughts and the inner-workings, so all I know is what I read in the newspapers this morning.

I certainly don't feel that it is caving in because if it had chosen to cave in, it would have done so long ago. It would have done so immediately after Mr. Agnew's first speech.

I think this is regularizing a situation from a different angle. There have been appeals to the courts from various parties seeking time to reply, and I look at this decision from that basis rather than from the instant analysis angle. But I think this will be very helpful in regularizing the right of reply and the form and time of reply.

Senator KENNEDY. I gathered this was a decision not to analyze the presidential statements themselves.

Mr. Koop. As I read the story this morning, I think it meant that if you analyze these statements of the President and you were giving time to reply, you would also have to analyze the statements of the repplier, and that this merely simplifies the situation by doing neither.

Senator KENNEDY. Does that create a problem, analyzing these statements?

Mr. Koop. No. Instant analysis really came about is just filling time to the next segment. If the President or another official speaking was very smart, he would time his speech so that it would come right up to the end of a time period and there would be no opportunity to fill with instant analysis or anything else. Analysis was done for that reason.

#### AGENCY DELAYS IN RESPONDING TO REQUESTS

Senator KENNEDY. One of the things that we heard a great deal about is the fact that many of the agencies themselves use the process of delay as a way of keeping information from either newsmen or other legitimate groups. Can any of you comment about that?

Mr. Koop. Mr. Chairman, I recently saw a letter directed to the Joint Media Committee, or a copy sent to the committee, Mr. Sheldon probably saw it, too—from an officer in the Pentagon. It was written to the managing editor of a southwestern paper complaining that his military affairs reporter back home over a period of months had submitted 75 or 80 questions to the Pentagon and this was becoming so burdensome that they hadn't had time to answer them, and he was asking the managing editor to call his reporter off.

One of the members of the Media Committee in reply suggested that if the Pentagon had answered the reporter's requests promptly he wouldn't be all piled up now. This, it seems to me, was purely a dilatory action, just putting the questions aside until they did pile up and then complaining.

Senator KENNEDY. Do any of the others want to make comments?

Mr. SHIELDON. Well, I had a few reporters say to me that they felt FOI was counterproductive in the sense that they got information quicker to begin with and setting up the procedures enabled certain people to follow those guidelines rather than responding immedi-

ately. But I think that is a very minority opinion. I think on the whole it hasn't worked that way.

I think this was an Oklahoma case that Mr. Koop cites but it does illustrate that a lot of information people will put requests particularly of small papers on the back burner and they may respond to some of the larger organizations out of fear and also out of desire to get the wider coverage. So I think FOI certainly if it helps anybody, and the small papers aren't intimidated by the cost, it is going to help the small papers.

Mr. BEHRINGER. Mr. Chairman, most of the contacts we have as small papers with an agency are by telephone. It is easy not to return the call or return it 2 days later and make it difficult to reach the appropriate parties, and no doubt this is a delaying tactic.

#### WARTIME INFORMATION SECURITY PROGRAM

Senator KENNEDY. Mr. Koop, one of the areas with which I know you have had a great deal of familiarity is the Wartime Information Security Program. Would your experience in that particular area be of any relevance to any of our considerations here?

Mr. Koop. We found that secrecy in Government can be carried to extremes in wartime. I always refer to the case of General Patton slapping the soldier who he thought was malingering. That story was bottled up in the Italian Theater, but it was commonly known in Washington at least among the press. One time a Washington reporter called us and asked if he could print it, and we checked the Pentagon and they said we don't want that to get out.

We overruled the Pentagon and said the story could be printed because there was no military security involved whatsoever. It was simply a matter of embarrassment to the Army and the general and should properly have been disclosed, in our opinion. So that even in wartime, as I say, we can have problems of oversecurity.

Senator KENNEDY. What about in peacetime? Are there any functions for workings of that Wartime Information Security Program?

Mr. Koop. It has always seemed to us censorship veterans that we should never try to attempt volunteer censorship in peacetime. On one occasion Byron Price, who had the Director of Censorship in World War II, and myself were summoned to the White House in 1961 after the Bay of Pigs for a discussion of the possibility of putting in volunteer censorship. We recommended against it; and I believe the next day a delegation of educators and publishers recommended against it. President Kennedy did not act. We feel that in peacetime it wouldn't work successfully, partly through less of a feeling of patriotism on the part of editors and broadcasters, but more importantly because every foreign embassy is doing business daily with Washington and can communicate anything back home. Only in wartime, when you can seal the borders and have no unfriendly foreign embassies on your soil, can you really put voluntary censorship into proper effect.

Senator KENNEDY. I remember President Kennedy saying if the New York Times actually printed the plan for the Bay of Pigs invasion that it might have saved him from committing that disaster.



We want to thank you gentlemen and also the groups that you represent. I think all of us are mindful of the tremendous role you played in the enactment of the Freedom of Information Act, and now as we are considering these alterations and changes, we are going to rely very heavily upon your experiences and suggestions. We value your assistance very highly in this regard. We want to thank you very much.

Mr. SHELDON. Thank you, Senator.

[Mr. Behringer's statement in full follows:]

#### STATEMENT OF NATIONAL NEWSPAPER ASSOCIATION

##### INTRODUCTION

Good morning, Mr. Chairman. I am Fred D. Behringer, Vice President and Executive Editor of Montgomery Newspapers in Fort Washington, Pennsylvania. I am accompanied by Theodore A. Serrill, Executive Vice President of the National Newspaper Association and William G. Mullen, Corporate Secretary and General Counsel of the National Newspaper Association.

I am the editor of two daily newspapers published in the Greater Philadelphia area and ten weekly newspapers, some of which are prizewinning publications. I am the immediate past president of the Pennsylvania Society of Newspaper Editors, which hears the view of editors on problems dealing with freedom of the Press and serve on the Freedom of Information Committee for the Greater Philadelphia chapter of Sigma Delta Chi, as well as NNA's FOI Committee.

The National Newspaper Association, as I am sure you are aware, is the official representative for our nation's approximately 8,500 community newspapers. These are the 7,500 weekly and 1,000 smaller city daily newspapers of our country whose major purpose is to provide local news and information to the communities they serve.

We are indeed honored to be a part of this prestigious panel which is composed mainly of our colleagues from the big city newspapers and from the broadcasting field.

##### BACKGROUND

In March, 1963, this Association informed a House subcommittee that it was no "Johnny-come-lately" to the fight for freedom of information. Long before the Cold War era we said, NNA (which was then NEA, the National Editorial Association) had been active in defending the precepts of the First Amendment.

This Subcommittee should know that the idea for the creation of the Freedom of Information Center at the University of Missouri, which maintains a continuing record of instances of censorship, suppressions, and manipulation of information and assists the Press in overcoming such instances, first emerged at a 1957 meeting of the then NEA. NNA continues to support the Freedom of Information Center, both in spirit and with financial contributions.

NNA has appeared before this Subcommittee in the past and has supported and publicized its activities since its inception.

This Association was directly involved in this Subcommittee's efforts to enact the present FOI law. As you realize, that law is the result of a compromise, as is all good legislation. We would even call the present law an experiment, to answer the question of whether such a concept could be made to work at the Federal level. Government officials warned against its enactment, predicting all sorts of dire consequences should it become law, arguments which they have recently repeated to you in trying to prevent amendments to improve the Act's effectiveness.

In spite of these contentions, it was discovered that the experiment worked—that it is feasible, indeed desirable, to make information possessed by the government available to the public. The fears expressed by government officials simply have not been realized.

What we have discovered, however, is that the law is not as effective or useful as it ought to be, and it is that problem to which we now address ourselves.

It is at the local level where NNA's constituency, the home town press, is the sole defender of the right to know. Policies of the Federal government toward access to governmental information however, are becoming more and

more of a problem to this segment of the news media because of the tremendous growth of the Federal government in recent years. This had led to the establishment of branch and regional Federal offices in nearly all of the three-thousand-plus counties of our nation.

What happens in Washington today becomes immediately important to local communities everywhere.

The Federal government's information policies are important not only with respect to actual access to information held by the Federal government, but also by way of educating state and local government officials as to the importance of making public information and public records available to the citizens served by those officials.

#### FREEDOM OF INFORMATION GOALS

The 21st Report of the House Committee on Government Operations on the Administration of the Freedom of Information Act says "Our concern in this Report and those which will follow is the protection, preservation and enlargement of the American people's 'right to know'".

Former Attorney General Ramsey Clark stated in his memorandum on the implementation of the FOI Act in 1967, "Nothing so diminishes democracy as secrecy".

Mr. Clark continued "... this statute imposes on the Executive Branch an affirmative obligation to adopt new standards and practices for publication and availability of information. It leaves no doubt that disclosure is a transcendent goal, yielding only to such compelling considerations as those provided for in the exemptions of the Act".

As this Committee has learned, those high goals have not been lived up to by those charged with administering this law in the various agencies and departments of the Federal government. The Report lists several areas where the law has proved to be deficient.

#### MAJOR FOI PROBLEMS OF COMMUNITY NEWSPAPERS

This Association, because of the type of newspapers which it represents, is principally concerned with four of these problem areas:

1. The bureaucratic delay in responding to individual requests for information. This Committee's 1972 investigation revealed that major Federal agencies took an average of 33 days for initial responses and when acting on appeals from a decision to deny information, major agencies took an average of 50 additional days.

We believe that amendments to require a preliminary determination as to compliance with an information request within ten days are most reasonable, and if anything, should be reduced.

2. We are concerned about the abuses in fee schedules set by some agencies for searching and copying requested documents. Some agencies have initiated excessive charges for such services as an effective tool denying information.

While the fees charged by many agencies have been modified in recent months, largely due to this Committee's oversight function, some remain unreasonably high. While such fees will not bankrupt a community newspaper, at least in most instances, we do not believe that there is a sufficient reason for inordinately high fees for copying and searching for government records.

3. The cumbersome and costly legal remedy provided by the Act in cases where information is denied is a particular concern. The time involved, the investment of a great deal of money in attorney fees and court costs and the advantages which inure to the government in such cases make litigation highly undesirable for the members of this Association in particular and render the Act less than useful.

4. Many problems are connected with the necessity of requesting an "identifiable record". Many agencies have used the requirement as one means of denying information to the public. In most cases, reporters working on a story do not have an identifiable source, but rather have information from sources which lead them to believe that such records are in the government's possession and a reporter simply needs a reasonable means of obtaining access to them. This requirement must be modified if the Act is ever going to prove to be truly effective.

As you know, the news media has been criticized for failing to utilize the Freedom of Information Act to its fullest extent. The items cited in the above paragraph are but a few of the reasons for this lack of utilization and are the principle reasons why the community press has not used the Act as much as is desirable.

An overriding factor in the failure of our segment of the Press to use the existing Act is the expense connected with litigating FOI matters in the courts once an agency has decided against making information available. This is probably the most undermining aspect of the existing law and severely limits the use of the FOI Act by all media, but especially smaller sized newspapers. The financial expense involved, coupled with the inherent delay in obtaining the information, means that very few community newspapers are ever going to be able to make use of the Act unless changes are initiated by this Committee.

#### ACCESS TO GOVERNMENT INFORMATION ALWAYS AN ISSUE

In recent months, the Press, particularly our colleagues in the metropolitan newspapers, have been subjected to criticism for stories concerning unethical election campaign practices. These stories ranged all the way from illegal fund raising activities to illegal disbursements of campaign funds to charges of illegal spying activities as well as attempts to cover up all of these activities. As a result, there has been a great tendency on the part of this Administration to close many channels of information to the Press. Such a trait, regrettably, is not an exclusive property of this current Administration. As James C. Hagerty, former press secretary to President Eisenhower, told the House Subcommittee on the opening day of its hearings last year:

"Availability of government information has been a fairly constant issue, in varying degrees, between government, the news media and the citizens of our nation almost since our founding days. From time to time in our country's history it has resulted in public distrust of the credibility of government. It has also raised questions as to the responsibility and integrity of a free press. It has never been definitely solved and I am not sure it ever can be."

While it may be true that no definitive solution can be written in terms of legislation, the mere fact that this Subcommittee expresses continuing interest in the subject gives a great deal of evidence for hope for the future, and much encouragement to our members.

#### NNA SUPPORTS LEGISLATIVE EFFORTS

The National Newspaper Association endorses the efforts of this Subcommittee to write new legislation in this field to alleviate the problems which we have emphasized in this statement and problems which others have brought to your attention. This Subcommittee will have our Association's full cooperation in efforts towards enacting the legislation which is the subject of these hearings.

We have reviewed the 21st Report of the House Committee on Government Operations dated September 20, 1972. In our opinion, the Report and its legislative recommendations, many of which are incorporated into S.1142, should be acted on by Congress with all reasonable speed. I assure you, Mr. Chairman, that the National Newspaper Association and its members in every part of the country will be carefully watching the progress of this legislation and that we will be doing all within our power to move the legislation along.

Thank you for providing our segment of the news media with an opportunity of participating in these discussions.

Senator KENNEDY. Our next witness is Mr. John Shattuck, staff counsel, American Civil Liberties Union. And I might ask, Mr. Peter Schuck, who represents the Consumers Union, to come up as well. Some of these matters can be taken up together.

#### STATEMENT OF JOHN F. SHATTUCK, STAFF COUNSEL, AMERICAN CIVIL LIBERTIES UNION

Mr. SHATTUCK. Thank you, Mr. Chairman.

I want to apologize initially for the fact that my prepared statement didn't arrive until about 15 minutes ago. I hereby volunteer to



be a witness if you have any hearings on the Pony Express. We have a great deal of difficulty getting documents down to Washington in a hurry.

My statement is rather lengthy and I would like to try to summarize it, but in view of the fact that you haven't seen it before, I may summarize it at a bit greater length than I would otherwise have.

I would like to start by suggesting that an aspect of the Freedom of Information Act which is generally overlooked, both by the courts and I think in most of the hearings that have considered proposed amendments to the act, is its constitutional premise. The Act is firmly grounded in the first amendment, but this is often forgotten and therefore the act has generally been narrowly construed, and much Government information has remained secret that should otherwise have gotten out.

The right to know has long been recognized by the Supreme Court quite apart from the Freedom of Information Act. In the legislative history of the act itself there are certain allusions to this.

Because the act places certain limitations on the right to know, I think it should be seen in the same context as other legislative and executive actions which have the effect of licensing first amendment activity. In other words, its limitations should be construed as narrowly as possible, not simply because the statute says so but because the Constitution says so.

Unfortunately the act hasn't worked out that way. Conflicting legislative history, bureaucratic hostility, judicial reluctance to give it broad effect—all of these impediments, which I am sure you will hear about from other witnesses and which have been chronicled in other hearings, are very serious.

The three major areas of the statute which need amendment are first, the affirmative provisions, which have many ambiguities—what is the definition of an agency, what are agency orders and statements of policy, and so forth. The exemptions, the second area, are nine in number and are extremely broad. And we in our litigation have found that the exemptions often swallow up the affirmative provisions of the act. And third, the administrative procedures, which I think S. 1142 addresses more than the other two problems, are very obstructive in many cases to citizens trying to get information.

We support S. 1142 but we find that there are a number of areas in which it could be strengthened, as a result of our experience as litigators under the act with no particular competence other than as lawyers who have to appear in court frequently to explain what a particular provision in the act means.

#### EXEMPTIONS IN THE FOIA

Because I think the exemptions are the most serious problem and also because they aren't addressed as much as the other parts of the statute in S. 1142, I would like to start by discussing them. The difficulty with the exemptions began with Ramsey Clark's memorandum, issued in 1967 when he was Attorney General, interpreting the exemptions in conformity with a report from the House which was considerably more restrictive than the report in the Senate. Most agencies and many courts have followed that Attorney General's

memorandum and the memorandum I think has resulted in very strict interpretation of information that would otherwise get out if an exemption didn't apply.

The first exemption in our view, particularly in light of what is happening today in the Watergate investigation, is the most serious flaw in the entire statute. The exemption covers national security information specifically exempted by Executive order. We are pleased to find that the provisions of S. 1142 address many of the difficulties in that exemption.

Instead of reducing the secrecy in foreign and military affairs, this first exemption I think has come legitimate that secrecy by appearing to authorize an unreviewable executive power to classify documents. In a sense it has permitted a national security cover to be offered to the courts, and the courts will not inspect documents to find out whether or not that cover has properly been asserted.

I might point out also that while the exemption was intended to cover foreign and military affairs, there is an increasing amount of classification covering domestic information as well. A very disturbing piece of news this morning was the fact that the White House domestic intelligence operations which were proposed in 1970 were all classified Top Secret. In my view there was minimal relationship between foreign and military affairs and those proposed intelligence operations.

In many respects, the problem with the (b)(1) exemption is the fault of the courts and not the Congress. While the courts are authorized by the act to conduct a thorough review of each case of nondisclosure, they simply don't do this in (b)(1) cases. It is very disturbing to go to court with cases where a classification appears to be extremely broad and improperly applied and to find that the courts simply will not review the information.

I think that this all came to a head, at least for lawyers, in the *Mink* case which was decided this year in the Supreme Court. By a 6 to 3 decision the Court held that certain documents which were classified top secret concerning the Amchitka Island nuclear test and its environmental impact, could not be inspected by the district court to determine whether or not they were properly classified and that the act prohibited anything other than a judicial finding determination that they were or were not classified.

However, I think that Justice White in his majority opinion has pointed the way toward a solution to this problem by explaining that the ground of the Court's decision was that the act was unequivocal in implying that national security information exempted by Executive order could not be inspected by courts. He specifically stated in the opinion that—

Congress could certainly have provided that the executive branch adopt new procedures, or it could have established its own procedures.

I take this language perhaps too optimistically but I take this as an invitation to Congress to do precisely what S. 1142 does, which is to provide for in camera judicial inspection of classified documents as well as other documents.

Senator KENNEDY. Has the Civil Liberties Union taken a position with regard to the general classification area, about how material is

to be classified and how declassified? Do you think we ought to be developing stronger procedures for administrative declassification rather than having the courts do it, or do you think there ought to be both?

Mr. SHATTUCK. I didn't mean to suggest this is the only way to do it. In fact, I think what the *Mink* case does is to suggest that Congress generally has power in this area to determine what classification procedures should be adopted, that it is not simply the President's power and that when Congress acts and a private litigant wants to test whether or not a document is properly classified under Congress' determination, then the courts should play a role. But clearly the first determination would have to be by Congress setting up a new classification system.

I think that the standard proposed in S. 1142 for this in-camera review is a good one. It is a flexible one. The disclosure would be required unless the court determined that it would be harmful to the national defense and foreign policy.

Senator KENNEDY. Do you expect these judges in these Federal district courts to be able to make judgments on matters of national security if they haven't got the background and other information that might have led up to the particular classification by the agency involved?

Mr. SHATTUCK. Well, I think that they will give extremely broad credence to a classification that was properly, procedurally established, and I would not propose that they go into a full-scale hearing on the merits of whether or not a document should or should not be classified. But I think there are so many documents that we find these days that on their face simply should not be classified that a court can make this determination at least for those kinds of documents. This is what the courts have already done in a few instances—Judge Gurfein's consideration of the Pentagon Papers was a rather good example of that.

I don't think there is a danger the courts will be flooded with litigation. To the contrary, what this statute would do, I think, together with Congress' movement in the classification area in general, would be to place a realistic deterrent on over-classification. Those few litigants who were able to go into court and demonstrate that a document was improperly classified should be entitled to compel its release, but I don't think you will have a flood of persons going in. Most people don't have the vaguest idea where the classified documents are to begin with.

I would like to report on a couple of classification abuses from our experience that I believe would not have occurred had the provisions in S. 1142 for in-camera inspection been adopted.

One is a case involving the Alger Hiss files and the FBI's investigation from 1933 to 1952 of Alger Hiss and Whittaker Chambers.

This file, which, of course, is enormous, has in a blanket fashion been attached with a national security stamp. On the other hand, there are certain persons who have gotten into it and persons outside of the Federal Bureau of Investigation have written books justifying the conclusions that the investigative file presumably contains.



It may be that parts of this file should properly be classified, but I think that this case exemplifies what inevitably happens under the current classification system. The system is used to manipulate public opinion by disclosing certain information to certain persons and not to others. There is now a case pending here in the district court in Washington which challenges the granting of discriminatory access to those parts of the Hiss-Chambers files that would not endanger privacy or national security interests and asks the information be released to all scholars who are studying the case.

In another case which exemplifies administrative abuse of the classification system in the FOIA context, three professors, Bertram Wolfe, Lev Dobriansky and Julius Epstein, who are interested in studying the forced repatriation of Russian refugees at the end of World War II, have been seeking for a long time something called the "Operation Keelhaul" files. They were initially denied these files when they made their first request in 1969 on the ground that they were classified. Subsequently, the files were in fact declassified by the State Department but they continued to be withheld from the litigants on the ground that the British, who were also interested in maintaining the classification, had not administratively reached the period where they could begin to declassify World War II documents. The case is now pending in the district, the Government has made no claim that the disclosure of these documents would harm national security, but it has simply said that since the British will not concur, the documents cannot be disclosed.

Other exemptions cause similar problems. The second exemption, matters related solely to the internal personnel rules and practices of an agency, really should not have created any difficulty. The exemption is designed to protect agencies from persons who are trying to find out how to manipulate them, people who would like to know how the IRS figures their tax returns, for example, but it has been much more broadly interpreted by the agencies to cover many documents which are internal but which have public significance and disclosure would not be prejudicial to the agency. Therefore, we support the excellent amendment proposed in the bill, limiting the exemption to internal personnel matters the disclosure of which would unduly impede the functioning of the agency.

The fourth exemption—commercial trade secrets and commercial or financial information obtained from a person which is privileged and confidential—has also raised a number of rather technical problems and has resulted in the withholding of a great deal of information that I don't think Congress intended to be withheld. Agencies are using it to withhold noncommercial and financial information which the agency rather than the person who provided the information claims is confidential. The amendment that you propose in S. 1142, would require that the exempt information be privileged, that it be clearly commercial, and that it be obtained from a person outside the agency.

The Environmental Protection Agency I think has a very good way of approaching this problem. They place the burden on the person who supplied the information to show why it should be kept confidential. In that way the Agency itself cannot withhold informa-

tion which is in the Agency's interest to withhold, rather than in the interest of the person who submitted it.

The fifth exemption, the interagency memorandum exemption, is really one of the muddiest areas of the statute and I was disappointed to see that there was no attempt in the bill to come to terms with it. I am not quite sure how one would come to terms with it, but a great deal of factual information is withheld simply because it is contained in internal policy or advisory documents. Again Justice White points the way in the *Mink* case suggesting that the statute really should provide that, in his words.

Purely factual material appearing in those documents in a form that is severable without compromising the private remainder of the documents should be released.

The courts do this but they don't do it with a great deal of regularity and I think the large amount of litigation around the fifth exemption is a warning that there needs to be more clarity in this area along the lines of what Justice White has suggested.

The sixth exemption—the personal and medical and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy—is only marginally amended by the bill to prevent the comingling of exempt and nonexempt information in one file. There is one further amendment that I would like to suggest to the subcommittee. It is quite possible to delete privacy-related matter from documents.

The courts do this occasionally, but the agencies generally do not. Deletion of names, identifying information, that sort of thing, should be required so that the integrity of the person whose privacy would otherwise be invaded is maintained, but the remaining portions of the document can be released.

This would be a very simple amendment. The language would provide that where possible the deletion of names and other identifying information should be effected and the documents released. This is a less drastic means of securing the privacy of the individuals involved, while effectuating the underlying purpose of the statute.

The seventh exemption, the investigatory files exemption, is another difficult area in the statute, with a very important purpose behind it which we recognize. The difficulty has come from the agencies' broad interpretation of investigatory and law enforcement purpose.

The bill that the subcommittee is considering would take care of the investigatory definition problem by requiring a record withheld under this section to be for a specific law enforcement purpose, and it would also extend disclosure requirements to scientific tests and reports or other data or material that sometimes are withheld by agencies on claims of investigatory files.

The other problem in the investigatory files exemption, the definition of law enforcement purpose. I think could be remedied by the bill, and in fact is addressed by a similar bill now pending before the House. This would define an investigatory record held for law enforcement purposes as a record where there was a genuine risk to enforcement proceedings if it were disclosed.

What is being gotten at here I think is the old investigatory files, the dead files, the files that are yellowing in the Justice Department and the FBI, and again I would refer to the Alger Hiss file, particularly, in view of the controversy still surrounding that case.

#### EXECUTIVE PRIVILEGE

Finally, there is a clear statement in the bill that none of these exemptions should apply to Congress, presumably including the committees of Congress seeking information from executive agencies. This is an extremely knotty area. Prof. Norman Dorsen testified for the ACLU before this and two other subcommittees on May 10 on the basis of a paper that he and I prepared on executive privilege, and our general position on that subject does not go as far as the provision in S. 1142. We feel that there should be a limited privilege for advice given not only within the executive branch but within the other two branches of government which, if regularly disclosed, would very likely hamper the process whereby decisions and policies are reached.

This privilege would not cover factual information. Nor would it cover decisions that have already been reached. It probably does not rise to constitutional stature the way that the White House now conceives it. It would not cover criminal conversations or criminal advice, but it would have to cover advice in order to protect the integrity of the decisionmaking process. With that one reservation, therefore, we support the provision of S. 1142 that requires that—that does not allow the exemptions to be used by agencies in responding to requests for information from Congress.

#### ADMINISTRATIVE AND ENFORCEMENT PROVISIONS

The administrative and enforcement provisions of S. 1142 also contain some very important amendments, particularly the one involving the identifiable records requirement in the statute as it now stands. It is often difficult to identify with particularity a record in an agency which you have never seen. Obviously you have to reasonably describe it so that it is possible for the agency to retrieve it, but that should be all. The S. 1142 provision that changes “identifiable records” to “records reasonably described by the persons making the request” states the requirement reasonably and flexibly.

There is no provision for limits on fees in the bill but that is another important area where amendment is needed. Many agencies charge fees as high as 75 cents per page, for beyond their out-of-pocket cost in making information available.

The amendment to the statutory time requirement for responding to requests we heartily support. Most agencies seem to take the approach that time is the best administrator, dragging out their compliance with them FOIA requests for long periods of time. That is perhaps why newsmen have not been using the act the way one would have expected, given their strong support for it.

The strict approach to the periods that is taken in the bill is necessary I think to limit the action period on request to 10 days and to



require that the documents be found as soon as possible after action has been taken on them.

Finally, one other amendment that I wish had been incorporated in S. 1142 from the lawyer's point of view is a requirement that a court grant an injunction when disclosure appears to be mandated by the statute because no exemption applies. The court often will make their own determination about whether or not it is in the best interests of the public or the "Nation" to require that the information be released even when no exemption applies. They are doing this less and less frequently but when the statute was first enacted this was a regular practice.

The courts also will occasionally reach out and claim that an exemption which was not claimed by the agency prohibits disclosure under the act. So I think an amendment which would make an injunction mandatory on the court passing upon a complaint that information was not disclosed under the act would be another important amendment to include.

The oversight provisions that are built into the bill are extremely important. For the 7 years the act has been in effect there have been irregular congressional hearings on how it is working but no continuous oversight. The reports that S. 1142 would require be made to Congress regularly by agencies how they are complying with the provisions of the act would hopefully promote agency responsibility.

Beyond all these technicalities the Freedom of Information Act symbolizes Congress acting today in its most essential role, that is, placing a check on the tremendous growth of Executive power.

A quote from Senator Symington which very much moved me when I read it recently pointed out Executive secrecy practices are in many ways making it extremely difficult for Congress to perform its function. He said, "I have slowly, reluctantly, and from the unique vantage point of having been a Pentagon official and the only Member of Congress to sit on both the Foreign Relations and Armed Services Committees of the Senate concluded that executive branch secrecy has now developed to a point where secret military actions often first create and then dominate foreign policy responses."

I think the idea behind that quote could very well apply to the domestic problems facing Congress as well.

The act, therefore, is so important to the democratic character of our society and the proper functioning of Government that I can think of few problems requiring greater attention from Congress. To be sure, problems of Executive privilege and other forms of Government secrecy cannot be cured by the Information Act alone, but the statute should be a serious and effective beginning for open Government. I believe the act is concerned very much with the first amendment and what that means to our society. And if it means that the Congress, in order to effectuate the first amendment interest, must take more of a role than it has before in scaling down Government secrecy, then it must take that role or it will soon find that many of its own constitutional powers have been forever swallowed up by the President.

Senator KENNEDY. Very fine. A very excellent statement, comprehensive, and it will be very useful to us in our own deliberations.

Is it your experience that a number of the administrative agencies that you have dealt with have different standards depending upon who is requesting information: one standard for special interest groups that may be involved, another standard for the general public? Can you give us any comment on that?

Mr. SHATTUCK. I think that is probably true. It is extremely difficult for a citizen acting on his own to overcome all of these inertial problems that I have described in the statement, but it becomes easier as one approaches lawyers and public-interest groups. I think that is a danger sign in terms of the functioning of the act. It is very well for the Civil Liberties Union or Consumers Union or other public-interest groups to point out difficulties in the statute in their rather refined experience in litigating and making requests, but basically I think these are the people who are using the statute and it is not the individual who wants to know whether or not the Government is going to buy up his land for example, or whether or not certain action took place in the past that he is interested in studying as a private citizen. And I think that a suggestion that I heard you make earlier, that a particular person be made individually responsible in an agency and be held out to the public as the man to go to with Freedom of Information Act problems would, to a certain extent, alleviate that. I think it would give the act more visibility and cause citizens to use it more. I think they would like to use it but it is really a morass and it is difficult to use without a lawyer.

Senator KENNEDY. How do you characterize the record of the ACLU under the act, recently as compared to earlier times?

Mr. SHATTUCK. Well, I am not sure that I really can answer that question because we, like many other public interest groups, have only recently begun to request information from executive branches. That is probably our own failing as much as anything. But our experience over the 7 years that the act has been in existence has been increasingly depressing in many ways. It has become more necessary to go to court. It has been more difficult to make the thing work. So in those seven years I think that we found more and more that these amendments are necessary.

Senator KENNEDY. Can you remain with us for just a little while?

Mr. SHATTUCK. Sure.

[The complete statement follows:]

STATEMENT OF JOHN H. F. SHATTUCK, STAFF COUNSEL, AMERICAN CIVIL  
LIBERTIES UNION

My name is John Shattuck and I am Staff Counsel for the American Civil Liberties Union, a nationwide, nonpartisan organization of more than 200,000 members, on whose behalf I appear today. The resources of the ACLU are entirely devoted to advancing and defending the Bill of Rights. During its fifty-three year existence the ACLU has been particularly concerned with the freedoms protected by the First Amendment, and in recent years we have represented a wide variety of citizens requesting disclosure of information from executive agencies of the government.

The right to know how the government is discharging its duties is essential to a democratic people who would be their own governors. This is the constitutional idea underlying the Freedom of Information Act. As President Johnson commented when he signed the new law in 1966:

"This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits . . . 2 Weekly Compilation of Presidential Documents 895, July 11, 1966."

# I. THE FAILURE OF THE FREEDOM OF INFORMATION ACT TO LIVE UP TO ITS CONSTITUTIONAL PREMISE

An understanding of the constitutional premise in the Freedom of Information Act is essential to defining its proper scope. This premise is too infrequently explained by courts interpreting the Act—one reason why the Act has often been so narrowly interpreted as to defeat its purpose.

The Supreme Court has long held that the First Amendment protects not only the right of citizens to speak and publish, but also the right of the public to receive information. See *Martin v. City of Struthers*, 319 U.S. 301, 308 (1965) (Brennan & Goldberg, J.J., concurring); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *New York Times v. Sullivan*, 376 U.S. 254, 270 (1963); see generally *Office of Communication of United Church of Christ v. F.C.C.*, 359 F.2d 994 (D.C. Cir. 1966). Thus, the Act must be seen as an affirmative effort on the part of Congress to give meaningful content to the system of freedom of expression as provided by the First Amendment. See Emerson, *The System of Freedom of Expression* (1971), Chapter VIII.

Because the public interest in disclosure of government documents under the Freedom of Information Act rises to constitutional stature, Congress specifically limited the circumstances under which this interest may be governmentally restricted to the nine exemptions provided in subsection (b) of the Act.

Subsection (c) also provides: "This Section [5 U.S.C. § 552] does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section." The purpose of this provision is crystal clear. As the Senate Report stated:

"The purpose of this subsection is to make it clear beyond doubt that all materials of the Government are to be made available to the public by publication or otherwise unless explicitly allowed to be kept secret by one of the exemptions." S. Rept. at 10.

The House Report contains very similar language. See House Rept. at 11.

Since the exemptions touch on First Amendment interests, they have the effect of "licensing" free speech and public debate. For this crucial reason they must be drafted by Congress and construed by the Courts as "narrow, definite and objective standards to guide the licensing authority." *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969). Moreover, they must be applied where applicable in a "uniform, consistent and nondiscriminatory" manner by federal agencies receiving requests for documents. See *Cox v. Louisiana*, 379 U.S. 536, 545 (1965).

Unfortunately, the Act has not worked out that way. Conflicting legislative history, as well as bureaucratic hostility and inertia, coupled with a general reluctance on the part of the judiciary to give it broad effect, has converted the statute in many respects into a "freedom from Information Act." And all of this has happened at a time when the Act is desperately needed to counteract a general increase in government secrecy.

In testimony last year before a House subcommittee, I outlined the ACLU's principal concerns about the operation of the Freedom of Information Act. I gave a variety of examples from our own experience of the extreme reluctance of executive agencies to abide by its spirit, and attempted to pinpoint the statutory loopholes which in our view tended to frustrate the public's right to know, and to dampen informed debate about issues of private as well as public importance. I expressed particular concern about certain ambiguities in the affirmative provisions of the Act, such as the definitions of "agency", agency "orders" and "statements of policy"; the lack of a mandatory judicial enforcement mechanism; and confusion about whether a person must show a particular "need" for government information before he can compel its disclosure.

The ACLU is also concerned about the breadth of the Act's nine exemptions and the imminent danger—again, in light of our litigation experience—that these exemptions would swallow up the affirmative provisions and defeat the purpose of the Act. This seemed particularly true of the national security [(b)(1)] and investigatory files [(b)(7)] exemptions. Our experiences over last year have even more solidly confirmed this fear, as I will describe later. Finally, I also voiced concern in our testimony last year about the growth of obstructive administrative procedures for processing requests for information under the Act. These include complicated agency request forms, exorbitant filing and reproduction fees, an unreasonable degree of specificity in identifying requested documents, refusals to separate non-exempt from exempt information, and unconscionable delays in processing initial requests and adminis-



trative appeals. In each of these areas where we felt the Act was not working properly we gave examples from cases in our own files.

The bill which the subcommittee is now considering is an important step toward remedying some of these basic deficiencies. While we generally support its remedial thrust, the bill has particular shortcomings and strengths which I would like to try to pinpoint. Because I believe the exemptions are the single largest problem in the existing statute, I shall look first at the ways in which S. 1142 would amend subsection (b) of the Act.

## II. AMENDING THE EXEMPTIONS FROM THE ACT

### (a) *The Attorney General's Memorandum*

The difficulty with the exemptions from the Act seems to start with a memorandum issued by the Attorney General in 1967, soon after enactment of the statute. ("Memorandum on the public Information Section of the Administrative Procedure Act"). This memorandum analyzed the Act, and particularly its exemptions, in very restrictive terms for the edification of government agencies. It took advantage of a conflict in the legislative history and relied exclusively on a rather expansive view of the exemptions taken by the House Government Operations Committee in its Report on the bill. The House Report, however, did not reflect the view of the Congress, having been written after the Senate had acted on its bill and taking a considerably different position from the Senate Committee Report.<sup>1</sup>

Nevertheless, the damage was done by the Attorney General's memorandum which has studiously been followed by most government agencies. Since no government witness had testified in favor of the Act when it was being considered in Senate and House hearings, the agencies were of course delighted to find the Attorney General giving it a restrictive interpretation.

Thus in discussing the exemption in subsection (b) (2) which excludes "matters that are related solely to internal personnel rules and practices of any agency," the Senate report at P. 8 explains: "[e]xemption No. 2 relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like." But the House Committee report states at P. 10: "[m]atters related solely to the internal personnel rules and practices of any agency, operating rules, guidelines, and manuals of procedure for Government investigators or examiners would be all exempt from disclosure." The Attorney General's Memorandum at pp. 30-31 accepts the House Committee's interpretation without so much as a passing reference to the sharp conflict between the two reports. This can hardly be called dispassionate analysis.

The Memorandum is replete with such bias. Subsection (b) (6), for example, exempts " \* \* \* personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The Senate Committee at p. 9 of its Report interpreted this language to mean, *inter alia*, "facts concerning the award of a pension or benefit should be disclosed to the public," while the House Report, on which the Attorney General's Memorandum relies, stated at P. 10 that the exemption does cover "the facts concerning the award of a pension or benefit."

As a final example let us look at the interpretations of subsection (b) (7) which exempts "matters that are \* \* \* investigative files compiled for law enforcement purposes except to the extent available by law to a private party." The Senate Committee Report at P. 9 states only that "these are the files prepared by government agencies to prosecute law violators. The disclosure of such files, except to the extent they are available by law to a private party, could harm the Government's case in court." The House Committee Report relied on by the Attorney General goes well beyond the statute when it says at P. 11: "This would include files prepared in connection with related Government litigation and adjudicative proceedings."

<sup>1</sup> A few discerning courts have recognized that "[s]ince only the Senate report was considered by both houses of Congress, the Senate Committee's reading of the Act is a better indication of legislative intent when the two reports conflict." See *Consumers Union of the United States, Inc. v. Veterans' Administration*, 301 F. Supp. 796, 801 (S. D. N. Y. 1969); *Benson v. General Services Administration*, 289 F. Supp. 590, 595 (W.D. Wash. 1968), *aff'd on other grounds*, 415 F. 2d 878 (9th Cir. 1969); *Soucie v. David*, 448 F. 2d 1067, 1077 (D.C. Cir. 1971). See also *Getman v. NLRB*, 450 F. 2d 670 (D.C. Cir. 1971).

The Attorney General's expansive interpretation of the exemptions has been transmitted only to federal agencies who must comply with the Act, but also to courts who must resolve the conflict between disclosure and exemption. Some courts have even upheld assertions of exemption by expressly relying on the Attorney General's Memorandum. See e.g., *Benson v. General Services Administration*, 289 F.Supp. 590 (W.D. Wash. 1968), *affirmed on other grounds*, 415 F.2d 878 (9th Cir. 1969); *Consumers Union of the United States v. Veterans Administration*, 301 F.Supp. 796, 801 (S.D.N.Y. 1969).

Let us then look at several of the more important broadly interpreted exemptions and the amendments proposed in S. 1142.

(b) "National security information specifically exempted by Executive order" [§(b)(1)].

The first exemption has increasingly become the greatest deficiency in the statute. Instead of reducing the obsessive secrecy in which the Executive conducts foreign and military affairs, it has tended to enhance and legitimate that secrecy by appearing to authorize an unreviewable executive power to classify documents.

In many respects this is the fault of the courts, not of Congress. While the courts are authorized by subsection (a)(3) to conduct a thorough review of each case of non-disclosure, when the national security exemption is asserted they decline to exercise their review power. This situation was brought to a head in January of this year when the Supreme Court held in its controversial 6-3 *Mink* decision that *any* classified information is exempt from disclosure whether or not it is properly or necessarily classified, and that a court is not entitled to review the propriety of the decision to classify [*Environmental Protection Agency v. Mink*, — U.S. —, 41 U.S.L.W. 4201 January 23, 1973]. *Mink*, as the subcommittee knows, involved a request by 33 Congressmen for the release of classified documents concerning the anticipated environmental impact of the underground nuclear test on Amchitka Island. Despite the extraordinary importance of the documents to a proper legislative debate, and in the face of evidence of the rampant overclassification and lumping together of classified and unclassified information, the Supreme Court held that the documents could not even be inspected by a court.

I believe, however, that the *Mink* decision was implicitly an invitation to Congress to amend subsection (b)(1) to require judicial review of documents claimed to be exempt by reason of their general classification. I am pleased to see that the sponsors of S. 1142 apparently share this view.

In his opinion for the majority in *Mink* Justice White rejected the argument of the respondents and the ACLU as *amicus curiae* that in order to qualify for the exemption each document would have to be classified pursuant to a *specific* order of the President and that the courts were therefore empowered to make an *in camera* inspection to review the propriety of the general classification. Justice White rejected this argument because in his view the language of subsection (b)(1) did not support it. On the other hand, he carefully pointed out that "Congress could certainly have provided that the Executive Branch adopt *new procedures*, or it could have established *its own procedures*. \* \* \*" 41 U.S.L.W. at 4204 [emphasis added].<sup>2</sup>

S. 1142 would require *in camera* inspection of documents claimed to be exempt, as part of the court's de novo review procedure under subsection (a)(3). This would have a salutary effect on the classification crisis resulting from the practices of the Executive Branch and brought to a head by the Supreme Court in *Mink*. This inspection would apply to *all* documents, but its effect would be most pronounced on documents withheld under the (b)(1) exemption.

Clarity is essential in matters of "national security" and the courts must be given a legislative standard to apply to their *in camera* inspections. The standard in section 1(a)(d) of S. 1142, which requires disclosure unless "harmful to the national defense or foreign policy," is flexible but comprehensible. Needless to say, some deference would have to be paid to a well considered and proce-

<sup>2</sup> It is our view that this language also implies, and properly so, that Congress itself has the constitutional authority to establish a classification system, and that Executive Order 11652, which authorizes the current classification system could not survive a direct congressional challenge by way of new legislation. See Dorsen and Shattuck, "Executive Privilege, The Congress and the Courts," hearings before Senate Subcommittee on Separation of Powers, Subcommittee on Administrative Practice and Procedure, and Subcommittee on Intergovernmental Relations (May 10, 1973).

durally correct executive decision to classify, but the traditional reluctance of the courts to conduct *any* review of "national security" determinations would provide a built-in safeguard against judicial abuse. Indeed, the central problem is to coax the courts to play even a limited role in this area.

Expanded judicial review of claims of the (b) (1) exemption is essential to prevent political and administrative abuses of the classification system.

The political abuses are too numerous to catalogue. One particularly striking example comes from my own litigation. Professor Allen Weinstein is chairman of the American Studies Department at Smith College. For the last five years he has been researching and writing about politics in the early Cold War period. His research has led him to an intensive study of the Alger Hiss perjury-espionage case, and he has repeatedly attempted to gain access to the voluminous dead FBI files on the case to verify the position taken by several other writers that the Hiss defense was a hoax. These other writers—unabashed publicists and apologists for the FBI—have by their own admission been permitted to inspect the FBI files, although they have cited no documents in reaching their conclusions. Weinstein, however, has been denied access by the FBI, presumably because he has published a widely respected article indicating that at least for him the case still raises unresolved questions. He has now sued the FBI under the Freedom of Information Act, but has immediately run up against the national security and investigative files exemptions, even though the documents are more than twenty-five years old, are part of a closed case, and have been disclosed already to other persons. The case is now pending in the District Court here in Washington [*Weinstein v. Gray*, Civil Action No. 2278-72].

Administrative abuses of the classification system are a result of its sheer weight. Under Executive Order 10501, there were more than 40,000 persons in the Defense Department alone with authority to classify, while under the new Executive Order 11652, as a study by the staff of the Subcommittee on Foreign Operations and Government Information of the House Government Operations Committee has shown "the number of persons granted authority to wield 'SECRET' stamps mushrooms \* \* \*, for every person with 'TOP SECRET' authority can designate without limitation any subordinate to use 'SECRET' stamps." CONG. REC. at E 2776 (March 21, 1972).

I would like to describe briefly one example of what I consider an administrative abuse which would not withstand scrutiny under the *in camera* inspection procedure proposed in S. 1142. Professors Bertram Wolfe, Lev Dobriansky and Julius Epstein (an historian, economist and international lawyer, respectively) have requested production of the so-called "Operation Keelhaul" files concerning the forced repatriation of Russian refugees after World War II. In an earlier case the documents were held to be exempt under subsection (b) (1) because they were classified, although the district court refused to inspect them. *Epstein v. Resor*, 421 F.2d 930 (9th Cir. 1970).

A year later the documents were cleared for declassification—presumably as a result of the lawsuit, since one subcommittee heard testimony last year that 160 million pages of World War II documents have still not been reviewed for declassification Hearings before a Subcommittee of the House Committee on Government Operations on U.S. Government Information Policies and Practices, 92nd Congress, 2nd Sess. (1972) (daily transcript), at 1012]. Nevertheless, the documents have been released because they are still classified by the British, who have retained a separate copy.

The professors have been told, moreover, that the British refuse "to address the question of declassification until they have completed their review of all their wartime documents," although there is no indication that they pose any objection to declassification based on the *contents* of the documents. [Exhibit A to Plaintiffs' Memorandum of Law in Support of their Motion for Summary Judgment, *Wolfe v. Froehle*, Civil Action No. 2277-72 (D.D.C.)]. In defending its claim of exemption, the government has candidly declined even to include an assertion that disclosure would cause significant injury to our relations with Great Britain or any other country, and rests its case entirely on the assumption that the court will not review the documents which can be withheld solely because the British have not concurred in their release. In short, these important historical documents are being withheld solely for administrative reasons, and even then, for the administrative convenience of a foreign government.



(c) "Matters related solely to the internal personnel rules and practices of an agency" [§(b)(2)].

The second exemption should have caused no problems at all, but it has. Part of the difficulty stems from a conflict in the legislative history. While the Senate Report took the position that the exemption did not cover information pertinent in any way to persons outside an agency,<sup>3</sup> the House Report treated it as somewhat broader in scope.<sup>4</sup>

Since the sole purpose of the exemption is to prevent persons outside the agency from disrupting matters which are solely internal and unrelated to the public, a broad interpretation does not seem justified. Accordingly, we welcome the amendment proposed in S. 1142 which would limit the exemption to "internal personnel" matters "the disclosure of which would unduly impede the functioning of [the] agency" [Sec. 2(a)].

The abuses to which the existing language has been subjected are illustrated by two ACLU cases. In one case we are representing a journalist who is seeking to be accredited as a reporter to cover the White House. He has been denied press credentials. Seeking a statement of reasons for the denial, he was informed by the Secret Service that the information was exempt from disclosure because it would reveal "internal practices" of the Secret Service within the terms of subsection (b)(2). In this case, therefore, the exemption was used to bar discovery of information pertinent to the apparent denial of a First Amendment right, and our client was forced to go into litigation to find out why he was barred from the White House.

In another case, editors of the New York University Law Review have attempted to obtain "sanitized" case studies of the well publicized disciplinary hearings at the United States Air Force Academy in order to document an article on military discipline. The Air Force refused to disclose, relying solely on the "privacy exemption" [subsection (b)(6)]. The District Court held that this exemption was inapplicable. Nevertheless, the court also held, *sua sponte*, that the records were exempt under subsection (b)(2), notwithstanding the fact that the Air Force itself had generated considerable public debate about its "Cadet Honor Code" by defending it in press conferences. The White House in November 1972, a month before the Court's decision, issued a press release announcing the Court's decision, issued a press release announcing the completion of a presidential study of morale and discipline at the service academies. In short, the documents sought were considered to be important to persons outside the Academy, and for this reason the Air Force did not rely on the (b)(2) exemption which the court held applied. *Rose v. Department of the Air Force*. — F.Supp. — (S.D. N.Y. Dec. 29, 1972).

The district court's decision in *Rose* also raises a serious question about the power of a court to disregard the burden of proof requirement of the statute. We recommend that Congress make it crystal clear that the burden is on an agency to show that it is entitled to exemption, and that a court is therefore without jurisdiction to deny disclosure on a ground not presented by the agency. Any other interpretation is inconsistent with the fact that the exemptions are intended to be *permissive* not *mandatory*.

(d) "Trade secrets and commercial or financial information obtained from a person and privileged or confidential" [§(b)(4)].

S. 1142 proposes an important amendment of the fourth exemption. The problem with the existing exemption is that it has been claimed by agencies and sometimes interpreted by courts to apply to non-commercial and financial information which the *agency* rather than the person who provided the information claims is confidential. Some agencies have denied disclosure of documents under subsection (b)(4) which are confidential but not commercial or financial in nature, e.g., *Barcelona Shoe Corp. v. Compton*, 217 F.Supp. 591, 594 (D.P.R. 1967) (statements of persons given in confidence to NLRB agents in connection with the investigation of an unfair labor practice); cf. *Tobacco In-*

<sup>3</sup> The Senate Report at P. 8 explains: "[e]xemption No. 2 relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like.

<sup>4</sup> The House Committee Report states at P. 10: "[n]matters related solely to the internal personnel rules and practices of any agency, operating rules, guidelines, and manuals of procedure for Government investigators or examiners would be all exempt from disclosure." The Attorney General's Memorandum at pp. 30-31 accepts the House interpretation without so much as a passing reference to the conflict between the two reports.

*stitute v. FTC*, Civ. No. 3035-67 (D.D.C. 1968). On the other hand, agencies have also refused under this exemption to disclose commercial information even though it was not "obtained from a person" but was developed by the agency. We had a client last year, for example, who was a nonprofit educational corporation. This organization requested the Army to supply it with data about a new 35-millimeter film projector the Army had developed. Even though the Army had no commercial interest in the projector, the data was withheld for more than three months under a claim of the (b)(4) exemption. On a final administrative appeal, and under threat of litigation, it was released.

Only a few courts have applied a properly restrictive interpretation to subsection (b)(4). In *Consumers Union v. Veterans Administration*, 301 F.Supp. 796 (S.D.N.Y. 1969), a case brought by an ACLU General Counsel, it was held that information to be exempt had to be (1) privileged or confidential, and (2) commercial or financial or a trade secret, and (3) obtained from a person outside the agency. See also *Grumman Aircraft Corporation v. Renegotiation Board*, 425 F.2d 578 (D.C. Cir. 1970). This is now made clear by the amendment proposed in S. 1142 which we support.

We believe that the burden of justifying any claim of confidentiality in this commercial area should be placed on the person submitting the information, and that the agency should disclose all such information unless its supplier can bear this burden. Apparently this is the practice of the Environmental Protection Agency, and it should be recommended to other departments [See Administration of the Freedom of Information Act. Twenty-first Report by the Committee on Government Operations, 92nd Cong. 2nd Sess. (Sept. 20, 1972), at 34].

(e) "Inter-agency or intra-agency memorandums or letters which would not be available to a party other than an agency in litigation with the agency" [§(b)(5)].

The internal memorandum exemption is one of the muddiest areas in the statute. It is unfortunate, therefore, that S. 1142 does not come to grips with the need to require agencies, whenever feasible, to separate fact from advice.

While it may be reasonable to exempt documents in which "facts" and "policy" are "inextricably intertwined," it is unreasonable automatically to apply the exemption to documents which contain any element of "policy" or "advice," however inconsequential.

Justice White addressed this problem in his opinion for the majority in *Mink*. In explaining why Congress had rejected an earlier version of the exemption, which was limited to internal memoranda "dealing solely with matters of law or policy," 41 U.S.L.W. at 4206, Justice White pointed out that:

\* \* \* the change cannot be read as suggesting that all factual material was to be rendered exempt from compelled disclosure. Congress sensibly discarded a wooden exemption that could have meant disclosure of manifestly private and confidential policy recommendations simply because the document containing them also happened to contain factual data. *That decision should not be taken, however, to embrace an equally wooden exemption permitting the withholding of factual material otherwise available on discovery merely because it was placed in a memorandum with matters of law, policy or opinion.* 41 U.S.L.W. at 4207. [Emphasis added.].

The opinion went on to recommend flexibility in applying the exemption and suggested that agencies and courts, wherever possible should make available to persons seeking documents under the Act "purely factual material appearing in those documents in a form that is severable without compromising the private remainder of the documents." *Id.*

Even where the factual information sought is not of the same momentous importance as the environmental impact reports in *Mink*, agencies have been extraordinarily quick to assert the internal memorandum exemption. Fortunately again the appellate courts have acted belatedly to preserve the integrity of the statute by requiring the disclosure of factual reports and scientific studies. See, e.g. *GSA v. Benson* 415 F.2d 878, 880 (9th Cir. 1969) (Tax appraisal reports relating to sale of property by government agency); *Ackerly v. Ley*, 420 F.2d 1336, 1341 (D.C. Cir. 1969) (agency report on hazardous substances in interstate commerce); *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 939 (D.C. Cir. 1970) (records of agency rule-making proceeding). This appellate concern with unwarranted assertions of the vague internal memorandum exemption is perhaps best demonstrated by the decision in *Gulick v. American Mail Line Ltd.*,

411 F.2d 696 (D.C. Cir. 1969), where the disclosure of an entire memorandum was required because the recalcitrant agency had publicly stated that it had based a policy decision on the facts in the memorandum.

The willingness of appellate courts to restrict the vague language of subsection (b) (5), however, is not an indication that the internal memorandum exemption is working well. On the contrary, the volume of appellate litigation in this area is a warning signal that this exemption is a major flaw in the statute. Government agencies are barring disclosure of a wide variety of purely factual memoranda, and the long delay in getting appellate review of their actions often makes the requested documents stale and meaningless upon their ultimate disclosures. The experiences of several of our clients underscore this problem. In one case a client has been denied information concerning proposed changes in the procedures of the United States Parole Board even though such procedures are currently being applied on a trial basis in at least two Federal prisons. Another client, the New York University Law Journal, has been denied a sanitized version of case summaries of disciplinary hearings in the Air Force Academy, notwithstanding their finality and factual content. A third client has been turned down in his attempts to get information from the Interstate Commerce Commission concerning racial discrimination in the trucking industry, ostensibly because the ICC has not yet formulated a policy on the subject.

These cases and others cited to the subcommittee during the course of these hearings point up the need for tightening the language in subsection (b) (5) to provide that factual information contained in internal memoranda shall not be withheld from disclosure.

(f) *"Personnel and medical and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"* [§ (b) (6)].

The only change proposed in S. 1142 for this exemption is contained in Sec. 2(c) which would substitute "records" for "files". Apparently, the purpose of this amendment is to "close another loophole in the Act whereby releasable information is often commingled with oother types of information in a single 'file', and therefore withheld." CONG. REC. H. 1509 (March 8, 1973). This seems sensible.

We wish to propose an additional amendment, however, which would make clear that personnel or medical files can be released if the private and personal material is deleted. The exemption must not be used to allow the withholding of unobjectionable material merely because it is contained in the same file as material that invades a person's privacy. In fact, whenever exempt matter is mixed with non-exempt matter, the agency should bear the burden of separating the non-exempt matter and disclosing it.

Very few agencies have adopted this practice of "sanitizing" records in order to protect personal privacy rather than merely withholding them, but the courts have generally compelled them to do so whenever possible. See, e.g., *Wellford v. Hardin*, 315 F.Supp. 768 (D.D.C. 1970), *aff'd* 444 F.2d 21 (4th Cir. 1971); *Grumman Aircraft Corporation v. Renegotiation Board*, *supra*; *Rose v. Department of the Air Force*, *supra*. The District Court in *Rose* summarized this practice as follows:

"Revelation of a set of facts absent some type of association with a person's name seems to us incapable of invading anyone's personal privacy. It is only the identifying connection to the individual that casts the personnel, medical, and similar files within the protection of the sixth exemption. The Act and courts following the Act, therefore, permit deletions of exempted portions of documents but then order the remainder to be released." *Rose v. Department of the Air Force*, *supra*, Slip Op. at 4-5.

In order to commend this approach to the agencies, subsection (b) (6) of the Act should be further amended to require the deletion, where feasible, of names or other identifying characteristics from records the disclosure of which would otherwise constitute a clearly unwarranted invasion of personal privacy.

(g) *"Investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency"* [§ (b) (7)].

The investigatory files exemption as originally drafted suffers from two principal abuses: (1) "investigatory" has been defined too broadly by most agencies, and (2) a "law enforcement purpose" has been regarded as a permanent shield, even when a law enforcement proceeding has been concluded or foreclosed and no prejudice could result from disclosure.



Sec. 2(d) of S. 1142 significantly clarifies the meaning of "investigatory" by requiring a record withheld under this section to be for a "specific law enforcement purpose" [emphasis added]. Even then the record cannot be withheld if it relates to "scientific tests, reports or data," or "inspection reports which relate to health, safety [or] environmental protection," or if it is a record underlying a public policy statement or a rulemaking. These narrowing provisions would go far toward preventing a recurrence of cases where unconscionably broad agency interpretations of the exemption were not repudiated until they reached the court of appeals. E.g., *Weisberg v. Department of Justice*,—F.2d—, 41 L.W. 2470 (D.C. Cir. Feb. 28, 1973) (request for spectrographic analyses of bullets which killed President Kennedy); *Getman v. NLRB*, 450 F.2d 670 (D. C. Cir. 1971) (request for names of union members eligible to vote in union election; list maintained by agency pursuant to its own adjudicative decision); *Wellford v. Hardin*, 444 F.2d 21 (4th Cir. 1971) (request for letters of warning already sent to meat processors about possible violations of federal law).

An additional amendment is needed, however, to curb the other principal abuse. This amendment would require disclosure of an investigatory "record" unless there was "a genuine risk to enforcement proceedings." This language is consistent with the original Senate Report which pointed out that the purpose of the (b) (7) exemption was to permit the withholding of "files prepared \* \* \* to prosecute law violators, \* \* \* the disclosure of [which] could harm the Government's case in Court." S. Rept. at 9 [emphasis added]. Unfortunately the agencies have not taken such a narrow view of the exemption, and courts have often found it necessary to compel them to release "dead files." See, e.g., *Weisberg v. Department of Justice*, *supra*, (investigatory information concerning Kennedy assassination now more than nine years old and not held for law enforcement proceedings); *Bristol-Myers v. FTC*, 424 F.2d 935 (D.C. Cir. 1970) (no further adjudicatory proceedings contemplated); *Wellford v. Hardin*, *supra*, 339 F.Supp. 467 (D.D.C. 1972) (disclosure of investigative information compelled six years after being compiled *Conney v. Sun Shipbuilding & Drydock Company*, 208 F.Supp. 708 (E.D.Pa. 1968) (no danger of "premature disclosure" of an agency's case).

Each of these changes is essential if excessively broad interpretations of the investigatory files exemption are to be avoided. In the *Weinstein* case referred to above, for example, an entire investigatory file containing voluminous documents between 25 and 40 years old is being withheld under a blanket claim of exemption. The law enforcement purpose for which the documents were originally compiled was fully served more than twenty years ago. To the extent that the privacy of innocent persons or live informers would be invaded by release of the documents, or that live informers would refuse to cooperate further, I see no reason why the deletion of names and identifying information from the documents would not be sufficient. In any event, I believe that this case underscores the need for amendment of the (b) (7) exemption.

(h) *Should the exemptions apply to requests for information by committees of Congress?*

S. 1142 would amend subsection (c) of the Act to provide that none of the exemptions shall authorize an executive agency to withhold records or information from Congress [Sec. 3]. This is an extremely important amendment which we support with one reservation.

Professor Norman Dorsen testified on May 10 on behalf of the ACLU before a joint committee considering the issue of executive privilege. Our position is contained in a paper, "Executive Privilege, the Congress and the Courts," co-authored by Professor Dorsen and myself which has been submitted for the record.

We agree that the Executive has no inherent Constitutional power to withhold information from committees of Congress if such information is germane to a proper legislative inquiry, as defined by the Supreme Court in *Watkins v. United States*, 354 U.S. 178 (1957). However, we take the position that all three branches of the federal government have an implied constitutional power to protect their internal decision-making processes by withholding advisory communications. This means that judicial law clerks and legislative assistants as well as officials within the executive branch cannot be forced to reveal what "advice" they gave to their superiors or associates.

The principal justification for this narrow but important privilege is that the development of public policy will be harmed if individuals in government cannot rely on the confidentiality of their communicated opinions as distinguished from decisions they have made and facts underlying those decisions. Freewheeling debate among colleagues and the presentation of iconoclastic ideas are inhibited if the prospect looms of later cross-examination. A tragic example of such inhibition was the stagnation of American policy toward China in the wake of the censorious treatment of China experts such as John Paton Davies, who courageously anticipated American Far Eastern Policy twenty years too soon, and paid dearly for their foresight. The Joe McCarthy era brings to mind many other tragic examples. To require all advice to be subject to often unfriendly scrutiny would surely dry up many sources of innovation and truth.

We have, therefore, attempted to block out as follows, the extremely broad boundaries of proper Congressional inquiry into Executive matters:

1. No executive witness summoned by a congressional committee may refuse to appear on the ground that he intends to invoke a "privilege" as to all or some of the questions that may be asked.

If an employee of the executive branch is directed by a superior not to testify, he should make himself available to explain the reasons for the refusal. Congress is intitled at least to this. Any other rule—and we fear that it is the rule by which we now live—opens the door wide to unjustified and even arbitrary assertions of privilege, and to the denial to the legislative branch of information it rightfully seeks in order to carry out its constitutional responsibilities.

2. a. The "advice privilege" may be claimed on behalf of a witness summoned by a Congressional committee only at the direction of the President personally.

b. The privilege may be asserted only with respect to questions concerning recommendations, advice and suggestions passed on to members of the executive branch for consideration in the formulation of policy.

c. A witness may not decline to answer questions concerning what has been done, as distinct from what has been advised. Whatever the title of an individual, and whether or not he is called an "advisor," he should be accountable for actions that he took in the name of the government and decisions that he made leading to action on the parts of others.

d. A witness may not decline to answer questions about facts that he acquired while acting in an official capacity.

The separation of "fact" from "advice," while sometimes difficult, is not impossible, and is in keeping with the purpose of the Freedom of Information Act. Without the separation an advice privilege invites abuse. As one witness pointed out in the 1971 Senate hearings on executive privilege, the protection of "advice" is potentially "a most mischievous privilege."

"Virtually every scrap written in the executive branch can, if desired, be labeled an internal working paper. Rarely are matters neatly labeled 'facts,' 'opinions,' or 'advice.' It can be used as readily to shield opinion corrupted by graft and disloyalty as to protect candor and honest judgment. And it can be used as a 'back door' device for withholding state secrets and investigative reports from Congress."

e. Congress may also require answers to questions about actions or advice by executive officials which it has probable cause to believe constitute criminal wrongdoing, such as the Watergate events and attempted coverup. In such situations, of course, individuals, summoned before Congress are entitled to exercise their constitutional rights, including, for example, the privilege against self-incrimination.

3. a. Documents could be withheld from Congress or a committee of Congress only on the personal signature of the President, or someone authorized to act on his behalf.

b. The privilege should extend not to entire documents but only to those portions of documents that embody the criteria set out above to justify an exercise of "advice privilege."

### III. ADMINISTRATION AND ENFORCEMENT

The administrative and enforcement provisions contained in section 552(a) are also in need of amendment. While the purpose of the existing administrative provisions of the Act is to require agencies to establish orderly procedures

that are consistent with prompt and full disclosure, section 552(a) contains a variety of weaknesses and ambiguities which have given the agency officials an opportunity to drag their feet in responding to requests for disclosure.

(a) *Formal requirements for requests.*

The statute currently requires agencies to process requests only for "identifiable records," thus placing an initial burden on the person making the request to be specific. This seems reasonable. In practice, however, the "identifiable records" requirement has become a tool for agencies to frustrate the statute by requiring a higher degree of specificity than any member of the public could reasonably be expected to satisfy. This problem was illustrated by many of the early agency regulations. The Renegotiation Board required the applicant to supply the date, addressee, and the "title or subject matter" of the record sought or to give an explanation for the failure to specify each of these matters. 32 C.F.R. §1480.6(b) (1970). The prescribed forms of the Justice and Commerce Departments also required very detailed specification. HEW regulations, although not as rigid, could be read to require with some inflexibility that the applicant supply specific details such as date, author, addressee, and topic. HEW, 45 C.F.R. §5.51(c) (1970). See also HUD, 24 C.F.R. §15-13(a) (1970); CAB, 14 C.F.R. §310.6(b) (1970).

The identifiability requirement has even been used by agencies as a basis for denying requests for records which in their view are too "voluminous" to make available. In our *Weinstein* case, described above, for example, the plaintiff has specified the FBI record he seeks in great detail, and the government in its responsive pleadings has itself identified the contested documents by date, file number, and size, claiming nevertheless that they are not "identifiable" within the meaning of the statute because they would be too difficult to produce even if they were not covered by any exemption. This is apparently a common agency argument, and it is generally not abandoned until a case reaches the court of appeals. The argument is often effective, therefore, in frustrating requests. See, e.g., *Wellford v. Hardin, supra* (request for all letters of warning issued to meat and poultry processors over a five year period rejected by Department of Agriculture); *Getman v. NLRB, supra* (request for names and addressed of all employees entitled to vote in approximately 35 union elections rejected by NLRB); *Bristol-Myers v. FTC, supra* (request for all information compiled by agency concerning certain specified medicines rejected by FTC).

In light of these abuses of the "identifiable records" requirement, the amendment proposed in section 1(b) of S. 1142 is important. Agencies would be ordered to process "any request for records which reasonably describes such records \* \* \*" and the word "identifiable" would be deleted from the statute. It should be made clear in the legislative history that at a minimum an agency could not refuse to process a request which did not identify a document by its internal symbol, or its date, or its author, or its addressee, nor could an agency refuse to consider a request for documents simply because it regarded them as too voluminous to produce.

A related amendment offered by section 1(a) of the bill would require agencies "promptly [to] publish and distribute (by sale or otherwise) copies of" the adjudicative proceedings, statements of policy and administrative manuals affecting members of the public which are not published in the *Federal Register* but are required to be released under subsection (a) (2) of the Act. These documents are currently required to be made "available for public inspection and copying," but in practice they are often withheld because agencies find it "burdensome" to make them available pursuant to isolated requests.

Another way of tightening up the formal requirements for requests which is not suggested in the bill would be to require agencies to establish a uniform schedule of costs for retrieval and duplication of records. Such costs currently range as high as 75 cents per page, with additional fees being charged for routine retrieval. Fees should be strictly limited to the actual and direct out-of-pocket expense to the government.

(b) *Exhausting administrative remedies.*

The only constraint which agencies currently face in processing requests is that they must make records "promptly available." As a 1972 Report of the House Government Operations Committee sadly demonstrates, however, many recalcitrant agencies follow the bureaucratic rule that "time is the best administrator."



Requests are often pending for months while agency records are being "located" and "reviewed." A primary reason for the delay appears to be the difficulty in getting the necessary officials to turn away from other matters and review the request. Gianella, *Agency Procedures Implementing Freedom of Information Act: A Proposal for Uniform Regulations*, 23 Ad. L. Rev. 217, 223. Another reason why an agency may be inclined to drag out matters is the hope that the passage of time will exhaust the applicant's interest in the documents that the agency is reluctant to produce. This is undoubtedly the reason why so few journalists have found the statute worth using at all.

In one ACLU case, we made a request by letter to the Justice Department's Internal Security Division. Two months after we requested information by letter we were informed that we had to complete the proper form. After we sent a completed form, more than two additional months elapsed before we were informed that the record we requested did not exist. In another case, involving the United States Parole Board, more than two months passed after we had made several telephone requests for a new set of parole criteria being used by the Board before we were orally informed that we would not receive the criteria. A demand letter was sent to the Board's counsel, threatening suit if we did not receive the information within twenty days. On the twentieth day, the Board's counsel by telephone informed us that he was almost certain we would be provided with a copy, but that he needed a couple of more weeks to clear release with others in the agency. Among the "reasons" given for this delay, the counsel stated that the Department of Justice was having difficulty deciding which office should handle our request, since it did not wish to concede that the Parole Board was an "agency" within the meaning of the Act.

Even more indicative of agencies' tendencies to delay, thereby undermining the purposes of the Act, are the time periods revealed by cases already decided by the courts under the Act. The minimum period reported between the sending of a demand letter and the filing of a complaint is 27 days. *American Mail Line, Ltd. v. Gulick*, 411 F.2d 696 (D.C.Cir. 1969). The maximum reported period was 10 months. *Consumers Union v. Veterans Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969).

S. 1142 contains detailed amendments which attempt to fill the current statutory void regarding the delays so often experienced in exhausting administrative remedies. The rule proposed is a 10-day period for agencies to respond to initial requests, and a period not exceeding 20 days for response to administrative appeals.

Since many of the administrative problems in the statute result from the failure of the agencies to employ their public information offices to expedite routine requests, we favor the strict approach taken by S. 1142. Routine requests should be answered immediately, and only the more complex should take as long as 10 days. Technical problems which an agency might encounter in producing the records are at least partially dealt with in section 1(c) of the bill, which requires agencies to make records available "as soon as practicable" after determining within the ten-day period whether they are subject to release.

Accordingly, if an agency has not responded within the 10-day period, a person making a request should be deemed to have exhausted his administrative remedies, which, of course would still be no assurance that a court would find that he is entitled to the information. In any event, by being forced to follow a strict 10-day rule, the agencies would find it necessary to routinize their handling of requests under the Act and to limit the bases for their decisions on whether to release information strictly to the criteria set forth in the statute.

We also support the amendment in section 1(e) of S. 1142 which would require agencies to file within 20 days an answer to any complaint filed in court by a person seeking to enjoin the agency from withholding information. The current 60-day period is both unnecessary and counter-productive. It is unnecessary because by the time an agency is hauled into court, it has necessarily formulated its legal position in its letters denying the information sought on an administrative level. The 60-day period is counter-productive because it merely exacerbates the problems of delay which make the statute useless for any person in need of information in a hurry.

#### (c) *Mandatory injunctions*

There is an unfortunate absence of any language in the statute requiring the courts to order disclosure of documents unless they are specifically exempted.

Because the statutory language and the legislative history both *imply* in the strongest terms that enforcement is mandatory, the absence of any express provision must be considered a Congressional oversight. Indeed, the implication of subsection (c) could not be clearer:

"This section does not authorize withholding of information or limiting the availability of records to the public, *except as specifically stated in this section.*" [Emphasis supplied.]

The Senate Report echoes this language in describing the purpose of the statute as "establish[ing] a general philosophy of full disclosure unless information is exempted under clearly delineated statutory language. \* \* \*" Sen. Rept. No. 813, at 3. See also *American Mail Line, Ltd. v. Gulick*, 411 F.2d 696 (D.C. Cir. 1969).

Unfortunately, the lack of explicit language about judicial enforcement has created a vacuum which some courts have filled by asserting an equitable discretion to deny relief even when the information sought is not exempt under the Act. In *Consumers Union of the United States v. Veterans Administration*, 301 F.Supp. 796 (S.D.N.Y. 1969), for example, the court found that none of the records was exempt from disclosure, but upheld the agency in part after balancing the equities to determine whether disclosure would do "significantly greater harm than good." 301 F.Supp. at 806.

A related problem resulting from the absence of a provision for mandatory injunctions is that a court can disregard an agency's failure to carry its burden of proof and decline to compel disclosure when it believes that the information is exempt for a reason not claimed by the agency. This is what happened to our clients in *Rose v. Department of the Air Force*, discussed above. In that case the privacy exemption had been claimed by the Air Force as a basis for withholding the Honor and Ethics Code case summaries sought by the plaintiffs. As we have seen, the court held that the Air Force had failed to prove the applicability of the privacy exemption, but it nevertheless refused to grant an injunction on the ground that the "personnel records" exemption never claimed by the agency was applicable.

An additional provision should be written into S. 1142, therefore, mandating that a court enjoin the withholding of information not demonstrated to be exempt by an agency. A mandatory injunction requirement would eliminate the equitable balancing of *Consumers Union* and the judicial discretion of *Rose*, and would further strengthen the affirmative thrust of the Act. Agencies would be less inclined to persist in withholding information not clearly covered by one of the exemptions if they knew that the role of the courts was strictly limited to reviewing the grounds for administrative denials of relief.

#### IV. CONCLUSION

An important general feature of S. 1142 is that it would create the machinery for continuous congressional oversight of the information practices of the federal government. We endorse the annual information reports which the agencies would be required to submit to Congress under section 4. This oversight machinery would hopefully carry through with many of the tasks which various subcommittees have been irregularly performing in recent years.

In theory, the Freedom of Information Act symbolizes Congress acting in its most essential role—that is, placing a check on the tremendous growth of executive power. Many wise observers have pointed out that the power of the presidency has grown during the Cold War era precisely because of the increasing secrecy with which the President has acted during this period, most notably in foreign affairs. Senator Stuart Symington, for example, recently pointed out that he has, as he put it, "slowly, reluctantly and from the unique vantage point of having been a Pentagon official and the only member of Congress to sit on both the Foreign Relations and Armed Services Committees, concluded that executive branch secrecy has now developed to a point where secret military actions often first create and then dominate foreign policy responses." [Quoted in "The Pentagon Papers and the Public," Freedom of Information Center Report No. 0013 (U. Mo. July 1971)].

The Freedom of Information Act, therefore, is so important to the democratic character of our society that I can think of few problems that require greater attention from Congress. To be sure, problems of executive privilege and other forms of government secrecy cannot be cured by the Information Act alone, but the statute should be a serious and effective beginning for open government. I believe the Act is concerned very much with the First Amend-

ment and what that means to our society. And if it means that the Congress, in order to effectuate this First Amendment interest, must take more of a role than it has before in scaling down government secrecy, then it must take that role or it will soon find that many of its own constitutional powers have been forever swallowed up by the President. As James Madison pointed out prophetically more than two centuries ago:

"Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information, or the means of requiring it, is but a prologue to a farce or a tragedy, or perhaps both."

Senator KENNEDY. I want to hear from Mr. Schuck. Just before we do, I would like to recognize in our audience today Mr. Frank Wozenkraft, who prepared the Attorney General's memorandum on the act in 1967. He is a well-recognized expert in this field. We want to welcome you to the hearings. We hope to be able to get some of your ideas on our amendments, at least informally, at a later date.

Mr. Schuck.

### STATEMENT OF MR. PETER H. SCHUCK, CONSUMERS UNION

Mr. SCHUCK. Thank you, Senator Kennedy, for inviting us to testify today.

My name is Peter Schuck. I am an attorney and director of the Washington office of Consumers Union. At this hearing today, we are representing the approximately 350,000 members of Consumers Union.

I have prepared a statement which I shall read from in part but I shall delete certain portions of it. I have submitted it for the record in the interests of brevity.

Senator KENNEDY. It will be printed in its entirety.

Mr. SCHUCK. For those of us whose daily activities include the monitoring of the policies and decisions of the Federal agencies, the act was hailed as a milestone in the legal development of a democratic society, a charter of pluralistic political life. Our high hopes have met with keen disappointment. The noble intent of Congress in enacting the act has foundered on the rocks of bureaucratic self-interest and secrecy. A statute which should have facilitated public participation in the public's work, has instead engendered endless litigation. What is more important, the act has produced relatively little information of consequence to citizens concerned about agency policies.

Before attempting to discuss my experience with the act, it is well to mention the act's merits. First, the act and its legislative history put the Congress and the President on record as strong advocates of full disclosure to the public of the way in which the public's work is conducted. This virtue would be strengthened if Congress would extend the reach of the act to its own activities and if the President would vigorously discipline executive agencies and officials who subvert the principles of the act. Second, the act shifts the burden of justification to him who would deny the public access to information. The official is obliged to find an exemption in which to cloak his claim of secrecy. This has led to some remarkably tortured readings of the act by secretive and defensive bureaucrats. And it has led to a welcome, if all too frequent, comic relief in the quest for public participation in Government. But it has also undoubtedly



prompted the release of some information that might otherwise have been withheld.

#### CASE STUDIES

Why, then has the act failed? I should like to discuss a few case studies in which I have been involved which will perhaps make this discussion a bit less abstract.

The first case reflects common tactics of bureaucratic subversion of the act. It might be called the "Fob him off with a meaningless summary" stratagem or the "Delay until the information becomes stale" routine. In early October, 1971, I received information that the Missouri meat inspection program was in very bad shape, notwithstanding the fact that after having applied for an received a 1-year extension, it had finally been certified by USDA under the Wholesome Meat Act of 1967 as at least equal to Federal standards.

Beginning in October 1971, I sought repeatedly to gain access to three categories of information: (1) Compliance surveys conducted by USDA with respect to the meat inspection programs of Missouri, Nebraska, and several other States: (2) USDA's correspondence with State officials concerning their findings; and (3) the surveys required by USDA to be conducted by these States and submitted to USDA as part of its compliance review programs.

By mid-December 1971, USDA had reneged on several oral promises to produce the information. It did supply a document entitled "Review Analyses of the Missouri State Meat Inspection System." This document was, to be very charitable, USDA's summary of the survey report. More accurately, the only information furnished concerning conditions in the plants was one page of unanalyzed scores for unidentified plants, and one-half page of extremely general description of conditions in four exempt plants. This document was essentially useless to a citizen seeking to analyze the nature and quality of the Missouri program and USDA's certification standards. Even less information was supplied on other States.

I then filed the appropriate administrative appeals under the Freedom of Information Act. On March 2, 1972, I received a final denial from G. R. Grange, Acting Administrator of the Consumer and Marketing Service, USDA. Mr. Grange asserted that USDA does not have surveys conducted by said States nor have any such surveys been submitted to the Department. One wonders how USDA can insure that certified States are and remain in fact equal to Federal standards if USDA does not even require the States to submit to USDA a copy of compliance surveys conducted at USDA's instance.

Mr. Grange then denied access to the other information, citing the investigatory file compiled for law enforcement purposes exemption and the intra-agency memoranda exemption. Yet the case of *Wellford v. Hardin* and other Freedom of Information Act court decisions made it perfectly clear that these exemptions were not applicable to this type of information. Moreover, we were informed that the Department of Justice had informally reviewed USDA's position on my information request and had strongly urged USDA to make the information public.

Mr. Grange concluded his denial thus:

It is my determination that disclosure of the request information would be damaging to cooperative State and Federal efforts and would reduce the usefulness of the review procedures as a tool in maintaining compliance and carrying out the provisions of the act.

Furthermore, the surveys in question were performed some time ago, and the status of the plants named therein has changed. Therefore, disclosure of this data would, in my view, constitute an unwarranted invasion of privacy. I must, therefore, deny your request for information. Needless to say none of those reasons are at all relevant under the act.

I was not alone in my efforts to gain access to this information. Missouri Senator Donald Manford made the same request to USDA. As chairman of the Senate Appropriations Committee, Senator Manford felt a particular responsibility to evaluate the quality of the Missouri meat inspection program and its conformity with Federal standards. Yet USDA and the Missouri Department of Agriculture both rejected his request. I believe that the Missouri Senate eventually had to subpoena these surveys from Missouri officials.

I was obliged to sue for these inspection reports. After the customary delays by the ever-resourceful, ever-dilatory Justice Department lawyers, I won a motion for summary judgment and the documents were finally released. This victory, like most under the act, was a hollow one, for it occurred in late September, one full year after my initial request. By that time, of course, the plant conditions reported in the documents were ancient history.

The second case demonstrates the use of the "It's exempt because it's embarrassing" approach to circumventing the act. One of the great tragedies of American politics has been the contribution by the Extension Service and other USDA agencies to the perpetuation of racial discrimination and poverty in many of our States. Seeking to determine the civil rights record of the USDA in recent years, I requested in November 1971, access to (1) all audits and investigative reports or other studies conducted by USDA's Office of Inspector General concerning the compliance by any USDA agency and any recipients of USDA assistance, with the Civil Rights Act of 1964.

Senator KENNEDY. Could we go down to your recommendations? We will include the other part in the record. I have to leave a little after 12:15.

#### GENERAL RECOMMENDATIONS

Mr. SCHUCK. All right. I have put together what I think is one way of approaching reform of the act and then I have made some specific suggestions concerning S. 1142.

It seems to me what is important is that the act contain sufficient incentive for bureaucratic compliance so that the act would become to a significant extent self-enforcing and not require endless litigation. The following reforms would help make the act self-enforcing, in my view.

1. The agency should be required to give an affirmative or a negative response to a formal request within a specified period of time, say 20 days. If the response is affirmative, the request information must be supplied promptly—as provided in the existing act. If the response is negative, the requester would be immediately informed in

writing, with the agency sending a copy of its letter of denial to a freedom of information unit, established in an independent consumer agency or other body outside the existing agencies.

2. Within a specified period of time, say 15 days, from the receipt of the letter of denial, the freedom of information unit would rule on the validity of the denial under the act and inform both the requester and the agency of this ruling. Within a specified period of time, say 5 days, the agency would have to inform the requester of its acquiescence or non-acquiescence in this ruling. If the agency acquiesced, the information would have to be supplied promptly. If the agency did not acquiesce, or if the requester was dissatisfied with the unit's ruling, the requester would then be entitled to sue immediately in a Federal district court. Since the vast majority of information requests are routine and fall into fairly well-established categories, the freedom of information unit could be a very small and progressively routinized operation whose rulings would over time create a consistent and integrated body of freedom information law.

3. If the requester is obliged to sue in order to obtain the requested information, and is successful, he should be entitled by statute to recover reasonable counsel fees from the agency which denied his request. S. 1142 provides for this, and that is a commendable addition. If the court rules that the agency's denial of the information was frivolous or willful, the requester should be entitled to recover punitive damages from the agency in an amount established by statute. These provisions would not only place the financial burden of a wrongful denial of information on the agency, where it belongs, but would also provide the agency and its officials with a realistic and palpable incentive to comply with the provisions of the act.

4. The act should be amended to include information in the possession of Congress, and should be clarified to remove any doubt that the work of consultants and other Government contractors is subject to the act, unless an exemption is otherwise applicable to the information request.

The recommendations with respect to S. 1142 itself are I think self-explanatory and I would be happy to respond to any questions you might have.

#### PRODUCT TEST DATA

Senator KENNEDY. You represent the organization that finally broke loose Government product test data? How many problems did you have with that?

Mr. SCHUCK. Our experience in trying to obtain Government product testing data has been a very disappointing one both in terms of the State of the information and in terms of the willingness of agencies to provide the information. But I would say that realistically the major problem has been that the information in possession of the Government with respect to product testing is not in a form that is useful to Consumers Union as a testing organization and I would think therefore it is completely useless to citizens in general mainly because the information is not related to consumer products, that is, it is not in a form which indicates whether the products that are being tested are consumer products, what the



model numbers are, and brand names are, et cetera, so they could be identified by consumers.

One reform that we would suggest which has nothing to do with the Freedom of Information Act but would be a very useful tool for consumers seeking product testing information in the hands of the Government would be the establishment of a central register in which every Government agency which was testing products would list in this register the products that it was testing. This would not require a detailed listing but simply a description of the testing program that the Government agency was carrying out. Then a group like Consumers Union or any other group which was seeking to know what products were being tested could look at this list and if they wanted more detailed information on a particular type of product being tested, they could then contact the agency doing the testing.

#### COMPLIANCE INCENTIVE

Senator KENNEDY. What has been both your experiences with the commingling of public records with records that are exempt? Have you found this to be any problem at all?

Mr. SCHUCK. Very much so. The courts have tended to uphold the principle that what we call the contamination technique, is not an appropriate response under the act and that the public portions and the exempt portions must be separate but that, of course, requires litigation, and as I have tried to indicate in my testimony, that is not a useful approach to obtaining information.

Mr. SHATTUCK. I think we have the same experience. Listening to Mr. Schuck, it echoes a great deal of my own experience.

I think one thing that needs to be added is that there is a real problem in all the agencies in simply complying. Many of them have not made—simply complying, quite apart from their desire to rule out complying. Many of them have not given serious consideration, I think, to how to go about answering these requests and one of the easiest ways to answer a request is to simply make a quick check of the file and see whether or not there is anything in there that might be exempt. It saves time and it saves administrative problems and I think it clearly illustrates the difficulty when you don't assign one man in the agency or in the branch that the information resides in to be responsible fulltime to make the kinds of reviews that have to be made, that Congress clearly is interested in. So I think it really boils down to man hours and dollars and hard facts like that which in the end may not have anything to do with the language of the statute but whether or not the agencies have made a serious attempt to put the manpower into compliance.

Mr. SCHUCK. I have a few additional observations. There are a number of elements of administration of the act which are very, very clear. First of all, it is clear that there is no—there is presently no incentive whatever in the act to comply.

Second, it is clear that the requirement of administrative appeals is a complete waste of time and resources. In almost no cases do administrative appeals reverse the original determination. They consume a great deal of time.

Third, the performance of the Justice Department in litigating—in first of all advising the agencies concerning the FOI Act and second, litigating under the act, is simply deplorable and I would say almost unethical as lawyers.

For one thing, the legal positions are very clear by the time the matter emerges from the agency since there has been an initial determination and then an administrative appeal, by definition. Then there is the traditional 60-day response requirement on the part of the Department of Justice. Then inevitably they ask for more time. There is no reason at all why the Department of Justice cannot respond to FOIA complaints within 10 days, certainly within the 20 days in which private citizens must answer complaints under normal civil litigation rules. I would suggest that there simply can be no controversy about those areas.

Senator KENNEDY. Just finally, we have heard from Mr. Mal Schechter of the Hospital Practice Magazine, that he has been engaged in inspection reports from the Social Security Administration, and has had to go to court a number of times to obtain the results. He has supplied material and given us four or five different instances of his attempting to require certain information with different results.

What should we do about making decisions binding on other agencies or even on the first agency in similar situations? Is there anything we can do that would be helpful?

[Material submitted to the subcommittee by Mr. Schechter appears at p. 178.]

Mr. SILATTUCK. Let me respond to that very briefly. I find a thread through all of this increasingly in my own mind of responsibility of one or two people in each agency. That requirement, if you will, administrative requirement, I think would solve a large number of these administrative problems that we are talking about. The Justice Department tried to do this about 4 or 5 years ago in a memorandum and they pointed out to the agencies to be very careful not to make bad law by insisting on withholding information that clearly wasn't exempt. But I think that approach has really fallen by the wayside and the only way to really bind agencies to the decisions that the courts and other agencies have reached I think is to establish a clear line of authority in each agency in determination of these matters.

Mr. SCHUCK. I would add that there are some very palpable incentives that could be built into the act, some of which I have suggested. The award of punitive damage for willful or frivolous withholding of information, the award of counsel fees in the event that the person requesting the information prevails, and the reporting to Congress, which is embodied in S. 1142, every year the experience of each agency under the act. Unfortunately bureaucrats are spending other people's money so the punitive damages and reasonable counsel fees provisions might not constitute a personal incentive to them. Nevertheless, I would expect that self-respecting and law-abiding administrators would make sure that agency funds would not be eroded by this kind of useless withholding of information.

## INTERNAL COMMUNICATIONS

Senator KENNEDY. Just finally, with the internal communications exemption, isn't there a legitimate problem with premature disclosure of recommendations and files where final decisions have not yet been made?

Mr. SHATTUCK. Let me try to square what probably is a conflict between our recommendations on executive privilege and our recommendations on the exemption for internal memoranda.

Yes, in answer to your question. I think premature disclosure of advisory material or investigatory files is one of the primary proper exemption areas within the statute and this is really an interest which I think Congress has to recognize within the executive. They want to avoid that kind of premature disclosure.

Having said that, however, it is my experience as I have pointed out in a number of cases cited in my statement that both of those major exemptions, investigatory and internal memoranda, are constantly being used to commingle factual information and nonadvisory, noninvestigatory information, or dead files. It is the area of the statute where the comingling problem goes on most and I think that is the way I would reconcile the two positions.

Mr. SCHUCK. A recent—there is a recent article in the Maryland Law Review which makes a persuasive case for the abolition of the internal memorandum exemption. In my own view, I am not convinced that that exemption is not required in some form. I simply don't think we have enough information to know how government decisionmaking would be effected if it were to be removed. I do, however, feel that in any event, there should be a time limit imposed on the exemption of documents which are, say, 1 year old or 6 months old or whatever time we regard as appropriate. After a particular period of time elapses, these documents should be published since I cannot see any continuing bureaucratic interest to be served by continuing to apply the exemption to them.

Senator KENNEDY. OK. Thank you very much. We probably will be back to get your guidance on some of the other recommendations.

Mr. SHATTUCK. Thank you, Mr. Chairman.

[The statement of Mr. Schuck follows.]

STATEMENT OF PETER H. SCHUCK, ESQ., CONSUMERS UNION OF UNITED STATES, INC.

Gentlemen: My name is Peter Schuck. I am an attorney and Director of the Washington Office of Consumers Union. Consumers Union, the largest consumer group in the world, is a nonprofit organization established in 1936. Consumers Union is the publisher of *Consumer Reports*, which now has a paid circulation of approximately 2.2 million. Consumers Union is supported solely by the subscribers to *Consumer Reports*, and accepts no commercial advertising or support. In addition, Consumers Union represents its approximately 350,000 members in administrative, judicial, and, upon invitation, legislative proceedings of concern to consumers.

I wish to thank the Subcommittee for inviting me to testify at these hearings on the Freedom of Information Act. The subcommittee is to be commended for its initiative in taking a systematic look at the way in which the Freedom of Information Act has actually operated in the six years since its enactment.



For those of us whose daily activities include the monitoring of the policies and decisions of the Federal agencies, the Act was hailed as a milestone in the legal development of a democratic society, a charter of pluralistic political life. Our high hopes have met with keen disappointment. The noble intent of Congress in enacting the Act has found red on the rocks of bureaucratic self-interest and secrecy. A statute which should have facilitated public participation in the public's work, has instead engendered endless litigation. What is more important, the Act has produced relatively little information of consequence to citizens concerned about agency policies.

Before attempting to discuss my experience with the Act, it is well to mention the Act's merits. First, the Act and its legislative history put the Congress and the President on record as strong advocates of full disclosure to the public of the way in which the public's work is conducted. Their virtue would be strengthened if Congress would extend the reach of the Act to its own activities and if the President would vigorously discipline executive agencies and officials who subvert the principles of the Act. Second, the Act shifts the burden of justification to him who would deny the public access to information. The official is obliged to find an exemption in which to cloak his claim of secrecy. This has led to some remarkably tortured readings of the Act by secretive and defensive bureaucrats. And it has led to a welcome, if all too frequent, comic relief in the quest for public participation in government. But it has also undoubtedly prompted the release of some information that might otherwise have been withheld.

Why, then has this Act failed? A brief description of a few case studies will perhaps make the discussion a bit less abstract.

The first case reflects common tactics of bureaucratic subversion of the Act. It might be called the "Fob-him-off-with-a-meaningless-summary" stratagem or the "Delay-until-the-information-becomes-stale" routine. In early October, 1971, I received information that the Missouri meat inspection program was in very bad shape, notwithstanding the fact that after having applied for and received a one-year extension, it had finally been certified by USDA under the Wholesome Meat Act of 1967 as "at least equal to" Federal standards.

Beginning in October 1971, I sought repeatedly to gain access to three categories of information: (1) Compliance surveys conducted by USDA with respect to the meat inspection programs of Missouri, Nebraska and several other states; (2) USDA's correspondence with state officials concerning their findings; and (3) the surveys required by USDA to be conducted by these states and submitted to USDA as part of its compliance review program.

By mid-December 1971, USDA had reneged on several oral promises to produce the information. It did supply a document entitled "Review Analyses of the Missouri State Meat Inspection System." This document was, to be very charitable, USDA's "summary" of the survey report. More accurately, the only information furnished concerning conditions in the plants was one page of unanalyzed scores for unidentified plants, and one-half page of extremely general descriptions of conditions in four exempt plants. This document was essentially useless to a citizen seeking to analyze the nature and quality of the Missouri program and USDA's certification standards. Even less information was supplied on other states.

I then filed the appropriate administrative appeals under the Freedom of Information Act. On March 2, 1972, I received a final denial from G. R. Grange, Acting Administrator of the Consumer and Marketing Service, USDA. Mr. Grange asserted that USDA "does not have surveys conducted by said States nor have any such surveys been submitted to the Departments." One wonders how USDA can ensure that "certified" states are and remain in fact "equal to" Federal standards if USDA does not even require the states to submit to USDA a copy of compliance surveys conducted at USDA's instance.

Mr. Grange then denied access to the other information, citing the "investigator file compiled for law enforcement purposes" exemption and the "intra-agency memoranda" exemption. Yet the case of *Wellford v. Harden* and other Freedom of Information Act court decisions made it perfectly clear that these exemptions were not applicable to this type of information. Moreover, we were informed that the Department of Justice had informally reviewed USDA's position on my information request and had strongly urged USDA to make the information public.

Mr. Grange concluded his denial thus:

"It is my determination that disclosure of the request information would be damaging to cooperative State and Federal efforts and would reduce the usefulness of the review procedures as a tool in maintaining compliance and carrying out the provisions of the (Act). Furthermore, the surveys in question were performed some time ago, and the status of the plants named therein has changed. Therefore, disclosure of this data would, in my view, constitute an unwarranted invasion of privacy. I must, therefore, deny your request for information."

I was not alone in my efforts to gain access to this information. Missouri Senator Donald Manford made the same request to USDA. As Chairman of the Senate Appropriations Committee, Senator Manford felt a particular responsibility to evaluate the quality of the Missouri meat inspection program and its conformity with Federal standards. Yet USDA and the Missouri Department of Agriculture both rejected his request. I believe that the Missouri Senate eventually had to subpoena these surveys from Missouri officials.

I was obliged to sue for these inspection reports. After the customary delays by the ever-resourceful, ever-dilatory Justice Department lawyers, I won a motion for summary judgment and the documents were finally released. This "victory", like most under the Act, was a hollow one, for it occurred in late September, one full year after my initial request. By that time, of course, the plant conditions reported in the documents were ancient history.

The second case demonstrates the use of the "It's-exempt-because it's-embarrassing" approach to circumventing the Act. One of the great tragedies of American politics has been the contribution by the Extension Service and other USDA agencies to the perpetuation of racial discrimination and poverty in many of our states. Seeking to determine the civil rights record of the USDA in recent years, I requested in November 1971, access to (1) all audits and investigative reports or other studies conducted by USDA's Office of Inspector General concerning the compliance by any USDA agency and any recipients of USDA assistance, with the Civil Rights Act of 1964; and (2) all audits and investigative reports or other studies in the possession of USDA concerning such compliance conducted by state or local governments. My request was denied. No such exemption is applicable to this type of final report on a pre-existing state of facts, particularly when, as is the case, these reports are routinely shown to the state agencies being audited! The information was denied because those audits and investigations are profoundly embarrassing to USDA and because the Act offers no incentive to a public official to comply with the Act, particularly under circumstances in which the nature of the requested information gives him a strong incentive *not* to comply. I was obliged to bring suit in November 1971.

Over eighteen months later, I have still not obtained even a ruling on my right to the documents, much less the documents themselves. When I obtained a court order compelling discovery, the Justice Department appealed that order to the Court of Appeals—and there the matter stands. If "Justice delayed is justice denied", how much more pernicious is the denial when *Justice* does the delaying.

The third case demonstrates the "Sue-us-again" tactic of avoiding the Act. In the summer of 1969, my former associate, Mr. Harrison Wellford, requested and was denied access to USDA's files of (1) warning letters to meat and poultry processors suspected of violating Federal meat laws, and (2) data on administrative detentions of meat and poultry products. After an expensive two-year legal battle (over \$6,000 in billable legal services), Mr. Wellford—and the public—established in the courts what Congress clearly established in the Act—the right to inspect such information.

In an effort to study and analyze the ways in which USDA does and does not enforce the meat and poultry laws against processors and packers on behalf of consumers, I sent a Georgetown Law School student, Mr. Michael Mass, to USDA to study the back-up files which alone supply the details concerning how USDA disposed of the cases mentioned, without details, in the now-public warning letters and detention logs. USDA refused to permit public access to this information. According to Mass, Mr. L. L. Gast, Director of Compliance and Evaluation for the Consumer and Marketing Service, stated that consumers would have to undertake another prolonged lawsuit in order to win access to this information.

The Department of Transportation is evidently a skillful practitioner of the "Now-it's-public-now-it's-private" gambit. A Nadar study group analyzing the

Federal Government's use of consultants requested access to a study performed for DOT by the Sperry Rand Corporation, a major beneficiary of government research contracts. The Sperry study had developed factual information on the management of the DOT research and development program.

DOT denied the requests, stating that "Although the reports were prepared for us by nongovernment experts, we regard them as intra-agency memoranda." But just in case anyone should point out that this was a rather novel interpretation of the term "intra-agency", DOT was prepared with another justification for denial. The Sperry reports, DOT contended, "consist of recommendations, proposals, advice, and opinions, and contain little or no factual information", and were therefore exempt under DOT regulations. Yet the proposal upon which the contract to Sperry was awarded, called for the development, testing and evaluation of factual information, and Sperry was paid for reporting such information to DOT. If Sperry properly performed its contract, this information must be disclosed under the Act. If Sperry did not properly perform it, why was it paid by DOT!

The Department of Justice does not confine its efforts in this area to engaging in unscrupulous advocacy on behalf of its narrow bureaucratic interests of other agencies. Recently, I requested access to correspondence from the Anti-trust Division to two of the largest meat packers in the country concerning their proposed merger. The Justice Department took the position that these letters qualified for the "investigatory files" exemption even though the cases clearly hold that the exemption is inapplicable where the requested documents are already known to those under investigation. Again, we have been compelled to sue.

What all of these cases indicate is that the Act is essentially unenforceable. Each of the statutory exemptions is reasonable in principle; indeed, most are essential. But they are so broadly worded that they can be—and, on the evidence, are—interpreted to exempt virtually everything that a bureaucrat wished to keep secret. Any law that can only be enforced by constant resort to litigation is a law without substance.

In general, there are two ways in which the Act can be strengthened. First, the exemptions can be defined more precisely and narrowly. In particular, the fifth exemption—for intra-agency or inter-agency memoranda—has been subject to the greatest manipulation and abuse and must be modified. There are good arguments to be made for its complete elimination. As Jack Anderson has demonstrated time and time again, the obsession of bureaucrats with putting their thoughts on paper is probably indestructible; we need not fear that eliminating the exemption would greatly alter official habits. At the very least, internal memoranda ought to be "de-classified" after a certain period of time has elapsed. In the meanwhile, the exemption ought to be confined to non-factual matters, as difficult as that line may be to draw in specific cases.

More important than the scope of specific exemptions is the need to build into the Act sufficient incentives for bureaucratic compliance so that the Act will become to a significant extent self-enforcing.

The following reforms would help make the Act self-enforcing:

1. The agency should be required to give an affirmative or a negative response to a formal request within a specified period of time, say twenty days. If the response is affirmative, the requested information must be supplied "promptly" (as provided in the existing Act). If the response is negative, the requester would be immediately informed in writing, with the agency sending a copy of its letter of denial to a Freedom of Information unit, established in an independent consumer agency or other body outside the existing agencies.

2. Within a specified period of time, say 15 days, from the receipt of the letter of denial, the Freedom of Information Unit would rule on the validity of the denial under the Act and inform both the requester and the agency of this ruling. Within a specified period of time, say 5 days, the agency would have to inform the requester of its acquiescence or non-acquiescence in this ruling. If the agency acquiesced, the information would have to be "supplied promptly". If the agency did not acquiesce, or if the requester was dissatisfied with the unit's ruling, the requester would then be entitled to sue immediately in a Federal district court. Since the vast majority of information requests are routine and fall into fairly well-established categories, the Freedom of Information unit could be a very small and progressively routinized operation whose rulings would over time create a consistent and integrated body of freedom of information law.



3. If the requester is obliged to sue in order to obtain the requested information, and is successful, he should be entitled by statute to recover reasonable counsel fees from the agency which denied his request. S.1142 provides for this and that is a commendable addition. If the court rules that the agency's denial of the information was frivolous or willful, the requestor should be entitled to recover punitive damages from the agency in an amount established by statute. These provisions would not only place the financial burden of a wrongful denial of information on the agency, where it belongs, but would also provide the agency and its officials with a realistic and palpable incentive to comply with the provisions of the Act.

4. The Act should be amended to include information in the possession of Congress, and should be clarified to remove any doubt that the work of consultants and other government contractors is subject to the Act, unless an exemption is otherwise applicable to the information request.

In addition, I have a number of comments on specific provisions of S.1142, in the event that the above reforms are not adopted.

1. Section 1(a) is a desirable addition.

2. Section 1(b) simply restates the case law under the Act concerning the identification of documents requirements. Your phrase "reasonably describe subject records", however, is vague. If you are going to restate the case law, then you might rather select the phrase used by the courts concerning the degree of specificity required in requests for documents.

3. Section 1(c) should be modified. First of all, there is no reason why a time limit for appeal of denial of information should be imposed upon a citizen requesting information. While the agency should be subject to time limits, in order to effect the purpose of the Act, the requestor of information should be able to appeal at any time since any delay would inure only to the detriment of the requestor. Subsection (B) should therefore be eliminated.

In addition, the time limits prescribed in Subsections (A) and (C) should be reversed, to give the agency 20 days for the initial determination and 10 days for a determination on appeal. Since the issues are presumably analyzed by the agency in the first instance, the decision on appeal should require very little additional time.

The last paragraph of §1(c) should provide that no more than one administrative appeal be required of a requestor of information. Any further appeal requirements are burdensome, time wasting, and serve no purpose.

The last paragraph of §1(c) should also provide that the requested documents be made available at the regional office of the agency nearest the location of the requestor, unless the requestor specifies another location for examination of documents. If the requestor agrees to pay for duplication, the documents should be sent by the agency to the requestor's designated address.

Finally, your bill does not reach the unconscionable practice of charging prohibitively duplicating fees and search costs. Accordingly, this section should provide for fair and uniform duplication costs, and should eliminate search fees altogether, except in the case of unusually burdensome requests.

4. Section 1(d)(1) is an effort to overrule the unfortunate *Mink* case, and would be essential to any reform of the Act. It might be desirable to define the burden imposed on the agency by the last clause (e.g., "by a preponderance of the evidence"). Section 1(d)(2) is unnecessary except for its last clause defining the proper parameters of the (b)(1) exemption, and that clause should appear at (b)(1) since it is part of the substantive definition of the exemption itself.

5. Section 1(e) is an excellent improvement in the law, although I would advocate an additional authorization for the award of punitive damages where the requestor can show that the denial was willful and in bad faith.

6. Section 2(a) of your bill should be amended to insure the right of a citizen to examine the contents of his or her personnel file. Your phrase "the disclosure of which would unduly impede the functioning of such agency" is a loophole which will swallow up the entire requirement to disclose. Certainly, any limitation on a person's right to examine his or her file should be extremely narrow and well defined.

7. Your §§2(b) and (c) simply restate existing case law.

8. Your §2(d) should be amended. Your phrase "for any specific law enforcement purpose" is not only vague but may possibly be construed to expand the existing exemption. Rather, you should adopt the standard set forth in the *Bristol-Myers* case and other cases focusing on the concreteness of the possible

enforcement action, possibly adding an additional presumption that after a certain period of time has elapsed, no enforcement action is a concrete possibility. Moreover, the "in the public interest" standard is so broad and meaningless that it will certainly be used by agencies to expand the exemption beyond its present dimensions. The phrase "scientific tests" reports and data" is also vague and unclear. For instance, it is not clear whether the phrase is intended to include non-scientific reports or data. In fact, your subsections (i), (ii) and (iii) are likely to be used to expand, rather than narrow, the exemption. It would be far better to focus on the factuality test with which the courts have construed the exemption.

The success of a pluralistic politics depends to an enormous extent upon the systematic continuous contribution to the policy-making process by all citizens affected by governmental decisions. This citizen input requires the fullest access to the information upon which public decisions are made, and should be regarded by public officials not as a burden, not as a meddlesome intrusion, but rather as a welcome opportunity to ennoble their performance of the public's work. By enacting the Freedom of Information Act, Congress affirmed this principle. It is now time to keep faith with that principle and make of it—and the Act—a reality.

Senator KENNEDY. Mr. Mazzochi, Oil, Chemical and Atomic Workers International.

Mr. Mazzochi has been a very active labor leader whose interests cover a wide variety of different local, national, and international issues. We have had the good fortune of working with him on a wide variety of different issues including health and safety legislation, and it is a great tribute to your union and to you that you take an interest in such an important and broad range of matters, I think it shows the enlightened leadership of the workers that you represent. You are to be commended, and I say what a personal pleasure it is to see you.

**STATEMENT OF ANTHONY MAZZOCHI, CITIZENSHIP-LEGISLATIVE DIRECTOR, OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, ACCOMPANIED BY STEVEN WODKA, CITIZENSHIP LEGISLATIVE DEPARTMENT**

Mr. MAZZOCHI. Thank you very much, Mr. Chairman.

I am accompanied by my aide this morning, Steve Wodka.

The Occupational Safety and Health Act was passed in December 1970. to combat the sad toll of accidents and disease on the job. The OSHA law placed considerable obligations on the Labor Department to conduct its business in an open manner. Unfortunately, this has not been the case. We have been frustrated many times in our attempts to seek important information that we feel is guaranteed to us under the law.

Under OSHA, the Labor Department can conduct inspections of health and safety conditions in plants in response to complaints that are filed by employees. According to the most recent statistics available, in this case for March 1973, 72 percent of those plants inspected were found not to be in compliance with OSHA standards. In these cases, OSHA issues citations against the employer along with appropriate penalties. The citations must be posted in the plant near where the violation occurred.

The OSHA citation is an important and impressive sounding document. It lists the standard violated, where and how the standard

was violated in the plant, and the date by which the violation must be abated.

However, rarely are citations written with any degree of detail so that workers are assured that their health and safety is being protected.

For instance, if a company is cited for excessive air contaminants, OSHA will not indicate on the citation how high the level of pollution was in the plant. All that is stated is that the standard has been exceeded. Exhibit A in a recent citation against a Union Carbide plant in Ohio illustrates this problem.

The workers in this plant have no idea if they are being supplied with the proper type of respiratory protective devices to combat the level of pollution. Neither do they know if the level of pollution is high enough to warrant special medical examinations. Basically, workers have a right to know of the level of poison that they are breathing every working day.

In order to secure this data, workers must make a special request to OSHA and ask for a copy of the inspector's report. This report will contain the specific data from the air sampling that the inspector performed.

Obtaining these reports from OSHA has become a very frustrating experience. In 34 cases with OSHA over the last 2 years where we have requested a copy of the inspector's report, we have at this writing been denied access in 21 cases or 62 percent. The usual excuse cited by OSHA is that these reports are part of an investigative file, and therefore are not disclosable until the case is dead. Exhibits B and C are illustrative. Unfortunately, many cases have a long life and easily can stay "alive" for more than a year with disclosure therefore being prohibited by OSHA.

Senator KENNEDY. What do you do when they tell you in these cases that you can't get the material because it is part of the investigative file?

Mr. MAZZOCCHI. Well, we have to seek the appropriate remedies available under the Freedom of Information Act which is a serious imposition on workers' right to know.

Now, in our case where we have an organization and a bureaucracy and we can process these cases on behalf of the workers. We have the remedies. We can go to court. For workers who don't have unions, which are the major proportion of workers in this country, they really are practically without remedies.

Now, a great deal of the time we find not outright refusal, just dilatory tactics being used where we don't hear for many months or they don't answer our request for this information. It is left hanging, so to speak.

Sometimes OSHA's response to an information request is blunt and to the point as evidenced in exhibit D. In this case, this flat denial of a copy of the inspector's report is inconsistent with OSHA's own regulation on disclosure. In those cases where we have been successful in securing the report, the average delay from the issuance of the citation to receipt of the report has been 3 months. This delay ranged from a minimum of 1 month to a maximum of 6 months.

Obviously, when dealing with information that is vital to the health of workers, such delays and denials are unconscionable. I



would like to interject here and just give an example. We recently had a case where a worker inhaled a radioactive airborne contaminant that seared his insides. His liver is damaged, many internal organs are severely damaged, his sexual life has been abruptly terminated, and he is in bad shape.

When we attempted to find out what the substance was, he was told it was a security matter. This was a Q-cleared plant and he could not find out what he ingested. We could not attempt to secure proper medical aid and, of course, the worker wasn't guaranteed that the AEC would provide lifetime wages and proper medical care for the remainder of his life and they just clamped security on the substance and to talk about it would be violating national security because it is a Q-cleared plant.

To put a person in that position is just an untenable situation both for the workers and those of us representing workers under these circumstances. One could conjure up wild scenarios of the person being spirited away by a foreign power because they wanted to find out what this secret substance was.

I have talked to scientists and even not knowing what the substance was, they raised serious questions whether identifying this substance would disclose some sort of secret affecting national security in that particular plant.

Senator KENNEDY. It is difficult for me to see why it would.

Mr. MAZZOCHI. This is an important case because he is in such serious pain.

Senator KENNEDY. I suppose it presents problems of protecting the other workers if you don't know the substance.

Mr. MAZZOCHI. Well, that is our constant problem. You see, as I pointed out in my previous testimony, what happens when an inspector comes into the plant, it is not enough to say you have violated the law to the employer. We have to know how badly a standard has been violated. In other words, if you are breathing carbon monoxide and it is 50 parts per million which is the standard, we want to know if it was 51 parts per million which will allow us to take certain action. We can spend some time in seeing too it that the situation is improved. Or is it 100 or 150 parts per million or more which might cause brain damage or heart damage. We want to be able to act immediately. We are denied that information and we have to go through that long process of obtaining it and then they tell us it is an investigative file and it can remain that way for an inordinate amount of time.

I will make this brief because I know we are under a time constraint. I just want to also bring to your attention the fact that the Government is protecting information for purposes of—withholding information for purposes of investigative work because they said under OSHA they may have to prosecute an employer for failure to abate.

Well, the employer provides the Government with his own plan of abatement. We seek to see what that plan is that the employer has provided. The Government says it is for investigative purposes, so what the Government is in essence saying to us is we are protecting the employer from the information that he supplied. It is just completely without logic. We could see if they had information that the

employer did not possess and they were going to use it in a trial procedure. That would make sense. But when the employer provides the information and the agencies withhold it from us we sometimes even lose our right to appeal under the act, so we are put into a box.

The information we are talking about is information that we need to protect the health and very life of the worker and it is not over some abstract principle. It has—it is of immediate concern to us and if you look at some of the exhibits, it is spelled out much more specifically, the nature of the problem we are attempting to bring before this committee.

We certainly support the amendments that we see contained in the Senate bill.

I think our testimony is self-explanatory.

Senator KENNEDY. As I understand it, what you are reminding us is that there is a wide distinction between health and safety considerations and perhaps financial considerations under this Freedom of Information Act. What you are pointing out, I think very effectively, is that in these areas which directly affect the life of workers—

Mr. MAZZOCHI. Time is crucial.

Senator KENNEDY [continuing]. The time is crucial and they ought to be given the kind of immediate consideration which is essential if we are going to protect them.

Mr. MAZZOCHI. Especially when we are dealing with chronic effects of many of these exposures. If something is acute, someone collapses, you know something has attacked him very directly. You can address yourself to that assaulting pollutant. We are dealing with these chronic problems that over a protracted period of time people ingest or inhale contaminants. Cancer is irreversible. A lot of the problems we are dealing with are cancer as a result of workplace exposure. So too be dilatory on an antitrust action is an inconvenience but to be dilatory where health is concerned may doom an individual to early death.

Senator KENNEDY. Why don't they make available the information? Is it just because they—

Mr. MAZZOCHI. Well, I can attribute it to bureaucratic obstinacy. I think the Department attempts to make the act as difficult as possible for workers to secure their rights under it the way they are operating it. I really don't know what their own rationale is for it. It is irrational as far as we are concerned because the type of penalty imposed on workers is taking a piece of their lives.

Senator KENNEDY. Have you drawn any conclusions that perhaps this obstinacy is related to sympathy for the companies themselves?

Mr. MAZZOCHI. Yes; well, I think that is the way I would react as a trade unionist and with long experience with regulatory agencies, they tend to sympathize with those whom they are attempting to regulate and I think that has been a problem anyway, in my experience.

Senator KENNEDY. How do you feel as a general matter about other special exceptions—like information involving auto defects and clinical drug studies—also being given preferred disclosure status under the act? You know, in these cases it is not the workers' health but the health and safety of the general public involved.

Mr. MAZZOCHI. I am for complete disclosure under most circumstances. I think that the public has a right to know what affects them and they should be able to act properly upon that knowledge and you can't act because you don't know. You see, our experience, my experience in the world of workers has been that it is only recently that I am learning that many of these substances formerly worked with had long-term health effects. I can't do anything about the substances I was breathing 20 years ago that might affect me 5 years from now. I learned too late that that is the problem.

We are attempting to avoid that in the future. People should know what they are exposed to in the public and work places so they can take the necessary options.

Senator KENNEDY. Well, I think this is very helpful. I think it makes a great deal of sense. I am really glad that you brought this up. It is an area where we really ought to move and I think we will make every effort to work with you and see that it is done.

Mr. MAZZOCHI. Thank you.

Senator KENNEDY. Thank you very much.

It is good to see you again.

[The full statement follows:]

STATEMENT OF ANTHONY MAZZOCHI, CITIZENSHIP-LEGISLATIVE DIRECTOR  
OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION

The experience of the Oil, Chemical and Atomic Workers International Union in seeking protection of its members from the new Federal job safety and health law clearly demonstrates the need for the amendments to the Freedom of Information Act as embodied in Senate Bill 1142.

The Occupational Safety and Health Act was passed in December, 1970 to combat the sad toll of accidents and disease on the job. The OSHA law placed considerable obligations on the Labor Department to conduct its business in an open manner. Unfortunately, this has not been the base. We have been frustrated many times in our attempts to seek important information that we feel is guaranteed to us under the law.

Under OSHA, the Labor Department can conduct inspections of health and safety conditions in plants in response to complaints that are filed by employees. According to the most recent statistics available, in this case for March 1973, 72% of those plants inspected were *found not* to be in compliance with OSHA standards. In these cases, OSHA issues citations against the employer along with appropriate penalties. The citations must be posted in the plant near where the violation occurred.

The OSHA citation is an important and impressive sounding document. It lists the standard violated, where and how the standard was violated in the plant, and the date by which the violation must be abated.

However, rarely are citations written with any degree of detail so that workers are assured that their health and safety is being protected.

For instance, if a company is cited for excessive air contaminants, OSHA will not indicate on the citation how high the level of pollution was in the plant. All that is stated is that the standard has been exceeded. Exhibit A (attached) in a recent citation against a Union Carbide plant in Ohio illustrates this problem.

The workers in this plant have no idea if they are being supplied with the proper type of respiratory protective devices to combat the level of pollution. Neither do they know if the level of pollution is high enough to warrant special medical examinations. Basically, workers have a right to know of the level of poison that they are breathing every working day.

In order to secure this data, workers must make a special request to OSHA and ask for a copy of the inspector's report. This report will contain the specific data from the air sampling that the inspector performed.

Obtaining these reports from OSHA has become a very frustrating experience. In 34 cases with OSHA over the last two years where we have requested a copy of the inspector's report, we have at this writing been denied access in



21 cases or 62%. The usual excuse cited by OSHA is that these reports are part of an investigative file, and therefore are not disclosable until the case is head. Exhibits B and C (attached) are illustrative. Unfortunately, many cases have a long life and easily can stay "alive" for more than a year with disclosure therefore being prohibited by OSHA.

Sometimes OSHA's response to an information request is blunt and to the point as evidenced in Exhibit D (attached). In this case, this flat denial of a copy of the inspector's report is inconsistent with OSHA's own regulation on disclosure. In those cases where we have been successful in securing the report, the average delay from the issuance of the citation to receipt of the report has been three months. This delay ranged from a minimum of one month to a maximum of six months.

Obviously, when dealing with information that is vital to the health of workers, such delays and denials are unconscionable. Thus the OCAW strongly supports the amendment contained in S. 1142 which would specifically apply the Freedom of Information Act to "inspection reports of any agency which relate to health, safety and environmental protection."

Another related problem area concerns plans of abatement that employers are often required to submit to OSHA as a result of a citation. Exhibit F (Attached) illustrates this kind of situation. Here, a company was cited for failing to protect its employees from exposure to benzidine. This chemical is a highly potent human carcinogen which causes bladder cancer. Any exposure to this chemical may later prove to be harmful. In fact, benzidine was the subject of an emergency standard by OSHA last month.

In this case, the plan of abatement that the company was required to submit to OSHA is a very important document. It must spell out the specific details of the corrective measures that the company plans to take. It must contain a timetable and then be approved by OSHA.

To the workers in that plant, access to the abatement plan is vital for two reasons: 1) so that they may judge the adequacy of the corrective measures and 2) so they may monitor the program of the abatement once the plan is approved by OSHA. In fact, the second reason is regularly emphasized by OSHA as a prime responsibility of employees. As OSHA does not have enough inspectors to perform followup inspections, OSHA relies on workers to inform the agency if the employer has failed to meet the abatement dates.

However, the abatement plans submitted by the employer are not released by OSHA to the workers. Neither are OSHA's letters of approval, comment or rejection. Workers are kept in the dark as to the elimination of hazards that threaten their lives. Typically, OSHA says: "This is a matter between the company and us. It is no more of your concern."

In the particular case of the benzidine plant that is cited here, OSHA's Region III still refuses to release these documents to the union even in light of the extreme health hazard that these workers face everyday.

If abatement plans and related correspondence are not considered as part of an inspector's report relating to health or safety, then we would urge that S. 1142 be amended to reflect this need.

This denial of information to employees has other serious implications. Going back to Exhibit A where a Union Carbide plant in Ohio was cited for overexposing its workers to ammonia and sulfuric acid, the employer was originally given five months to submit an abatement plan. Five months was already overly generous, but Carbide requested and was granted by OSHA an additional five weeks over the five months to submit the plan. This request and subsequent approval was performed secretly between OSHA and the company. Therefore, it effectively denied the employees their statutory right under OSHA to challenge such extensions of time.

Section 6(e) of the Occupational Safety and Health Act explicitly requires notice of such extension of time to be published in the Federal Register: Whenever the Secretary promulgates any standard, makes any rule, order, or decision, grants any exemption or extension of time, or compromises, mitigates, or settles any penalty assessed under this Act, he shall include a statement of the reasons for such action, which shall be published in the Federal Register."

Unfortunately, this provision of the Act has also been ignored by the Labor Department. Congressman Dominick Daniels has also criticized the Labor Department on this point.

SUPPLEMENTAL  
CITATION

U.S. DEPARTMENT OF LABOR  
Occupational Safety and Health Administration  
1. Columbus Area Office  
224 Bryden Building  
700 Bryden Road  
Columbus, Ohio 43215

OSHA NO.	OSHA NO.	FY
P-1999	29	73
AREA	REGION	
1800	05	

OCWA EXHIBIT A

TO: 2.

Union Carbide Corporation  
Route #7, South  
Marietta, Ohio 45750

3. Citation Number 1

4. Page 1 of 5. 1

6. TYPE OF ALLEGED VIOLATION(S): NONSERIOUS

An inspection was made on December 5, 19 72 of a place of employment located at:

8. Route #7, South, Marietta, Ohio and described as follows:  
Manufacturer of ferro-alloys

On the basis of the inspection it is alleged that you have violated the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, in the following respects:

10. Item number	11. Standard, regulation or section of the Act allegedly violated	12. Description of alleged violation	13. Date by which alleged violation must be corrected
1	29 CFR Section 1910.93	Failure to limit employees' exposure to 35 mg/m <sup>3</sup> or less of ammonia while operating manganese cells.	January 1, 1974
2	29 CFR Section 1910.93	Failure to limit employees' exposure to 1 mg/m <sup>3</sup> or less of sulfuric acid while operating manganese dioxide cells and chromium cells.	January 1, 1974

The law requires that a copy of this citation shall be prominently posted in a conspicuous place at or near each place that an alleged violation referred to in the citation occurred. The citation must remain posted until all alleged violations cited therein are corrected, or for 3 working days\*, whichever period is longer.

RIGHTS OF EMPLOYEES

Any employee or representative of employees who believes that an employer is in violation of the law has the right to request a copy of this citation for the correction of a violation is unreasonable has the right to contest such time for correction by submitting a letter to the U.S. Department of Labor at the address shown above within 15 working days\* of the issuance of this citation.

\*No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Sec. 11(c) (1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, 660(c)(1).

\*Under the Occupational Safety and Health Act, the term "Working Day" means Mondays through Fridays but does not include Saturdays, Sundays, or Federal Holidays.

14.

Area Director's Signature *R. A. Schmidt*

Issuance Date May 30, 19 73

OCAW EXHIBIT B

# Oil, Chemical and Atomic Workers International Union

ANTHONY MAZZOCCHI, DIRECTOR  
CITIZENSHIP-LEGISLATIVE DEPARTMENT

CERTIFIED MAIL



1125 - 16TH STREET, N. W.  
WASHINGTON, D. C. 20036  
PHONE: 227-2100

April 12, 1973

Mr. David H. Rhone, Regional Administrator  
U. S. Department of Labor  
Occupational Safety & Health Administration  
Room 15220 Gateway Bldg.  
3535 Market Street  
Philadelphia, Pa. 19104

Dear Mr. Rhone:

We request that copies of all citations, notices of proposed penalties and the Inspector's report including monitoring data (when available) be forwarded to us immediately pursuant to the OSHA inspection of J. S. Young, Inc. (Young Aniline Works) of Baltimore, Maryland in March and April 1973. Our Local Union No. 8-675 represents the employees at that facility.

Release of this information to us is guaranteed by the Freedom of Information Act.

I have enclosed a copy of the United Steelworkers' comments on our cancer petition. It contains some highly revealing statistics on the high rate of cancer in a benzidine plant.

Sincerely yours,

Anthony Mazzocchi, Director  
Citizenship-Legislative Department

Enc.

copy to: Maurice R. Daly, Area Director, OSHA, Baltimore, Md.  
Tracy Mechter  
Steven Krust, Regional Solicitor  
U.S. Dept. of Labor, Philadelphia, Pa.

To deal with this problem, we suggest an addition to S. 1142 that would require each agency to promptly publish and distribute any rule, order or decision that relates to health, safety, or environmental protection.

One other amendment that is also needed for the Freedom of Information Act is the control if not the elimination of exorbitant fees charged by agencies for copies of documents. We have paid as much as \$48 for a copy of an OSHA inspection report. While such a fee is within the grasp of a large International Union, it is certainly a serious impediment for the average citizen who wishes the facts on the hazards in his workplace.

The one court challenge that this Union has been involved under the Freedom of Information Act centered on these same kind of inspector's reports that were written by OSHA's predecessor, the Bureau of Labor Standards which enforced the Walsh-Healey Act. On February 1, 1971, the U. S. District



Court ruled in the case of *Weckslar et al. vs Schultz* that the inspector's reports were to be made public. The Labor Department, however, fails to acknowledge this court decision as a precedent for OSHA.

Our experience with this one agency points to the need for the passage of S. 1142. We further hope that this Committee would look favorably on the particular recommendations for further amendments to the Freedom of Information Act that we have made today.

U.S. DEPARTMENT OF LABOR  
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION  
REGIONAL OFFICE — SUITE 45220  
3535 MARKET STREET  
PHILADELPHIA, PA. 19104

OSHA EXHIBIT C

April 25, 1973

RECEIVED

APR 30 1973

WASHINGTON, D. C.

Mr. Anthony Mazzocchi, Director  
Citizenship-Legislative Department  
Oil, Chemical and Atomic Workers.

International Union  
1126-16th Street, N.W.  
Washington, D.C. 20036

Dear Mr. Mazzocchi:

This is in response to your letter of April 12, 1973, concerning the OSHA inspection at Young Aniline Works, Baltimore, Md.

Copies of citations issued as a result of that inspection were sent to Mr. Steve Wodka on April 24, 1973.

It is possible that the citations may be contested. In that event, the matter will be in litigation and disclosure of any information will be controlled not only by the provisions of the Freedom of Information Act, but the Federal Rules of Civil Procedure and the Rules of Procedure of the Occupational Safety and Health Review Commission.

For this reason, we are unable to supply the information requested by you until such time as the case is closed in our files. At that time we would be happy to provide you with as much information as is permitted under existing regulations.

Sincerely yours,



DAVID H. RHONE  
Regional Administrator



# *Oil, Chemical and Atomic Workers International Union*

OCAW EXHIBIT D

ANTHONY MAZZOCCHI, DIRECTOR  
CITIZENSHIP-LEGISLATIVE DEPARTMENT



1126 - 16TH STREET, N.W.  
WASHINGTON, D. C. 20036  
PHONE: 223-2188

August 18, 1972

Mr. Harry G. Lacey, Area Director  
U. S. Department of Labor  
Occupational Safety & Health Administration  
Room 445 D - Federal Building  
1000 Liberty Avenue  
Pittsburgh, Pa. 15222

Dear Mr. Lacey:

Recently, an OSHA inspection was conducted at the Alloy, West Virginia plant of the Union Carbide Corporation. As our International Union represents the employees at this facility, we would appreciate copies of the citations and notice of proposed penalties be sent to this office and to the local union. The local's president is:

Mr. J. W. Simmons  
103 Polaris Drive  
Oak Hill, W. Va. 25961

Release of this information is guaranteed by the Freedom of Information Act. As soon as possible, we also seek release of the inspector's report and monitoring data.

Sincerely yours,

Steven Wodka, Legislative Aide

cc: J. W. Simmons, Local 3-89

U.S. DEPARTMENT OF LABOR  
OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION  
Jennet Building, Room 802, 4099 William Penn Highway  
Monroeville, Pennsylvania 15146

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September 28, 1972

Mr. Steven Wodka, Legislative Aide  
Oil, Chemical and Atomic Workers International Union  
1126-16th Street, N.W.  
Washington, D. C. 20036

Dear Mr. Wodka:

Pursuant to your request we are enclosing a copy of the Citation which has been issued against Union Carbide.

We are advised by our Regional Solicitor that the Freedom of Information Act does not entitle you to copies of the other documents which you have requested, particularly the investigator's reports and monitoring data.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Harry G. Lacey".

HARRY G. LACEY  
Area Director  
Pittsburgh Area Office.

Enclosure:  
Copy of Citation issued to  
Union Carbide.



U.S. DEPARTMENT OF LABOR  
Occupational Safety and Health Administration

Mr. Robert Daly, Area Director  
Room 1110A, Federal Building  
31 Hopkins Plaza, Charles Center  
Baltimore, Maryland 21201

## CITATION

OSHA NO.	OSHA-1 NO.	FY
R-2341,	30	72
AREA	REGION	
0050	3	

OCWA EXHIBIT F

TO: J. S. YOUNG COMPANY  
2701 Boston Street  
Baltimore, Maryland 21224

3. Citation Number 1  
4. Page 1 of 5. 2

6. TYPE OF ALLEGED VIOLATION(S): SERIOUS

An inspection was made on 3/8, 12, & 15, 1973 of a place of employment located at:

8. 2701 Boston Street, Baltimore, Maryland 21224 and described as follows:  
9. manufacturer of aniline dyes

On the basis of the inspection it is alleged that you have violated the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq., in the following respects:

10. Item number	11. Standard, regulation or section of the Act allegedly violated	12. Description of alleged violation	13. Date by which alleged violation must be corrected
1	General Duty Clause, Public Law 91-596, Sec- tion (5)(a)(1)	<p>Failure to furnish each employee employment and a place of employment which is free from recognized occupational hazards that are causing or are likely to cause death, serious illness, or physical harm, in that management:</p> <p>a) failed to provide adequate feasible engineering and/or administrative controls to limit employees' exposure to benzidine or its salts</p> <p>b) failed to provide sufficient instruction to employees as to the seriousness of the occupational hazard and the means of avoiding them in the handling of recognized chemical hazards including the carcinogens benzidine or its salts.</p> <p>c) failed to provide a work-clothing change program and a wash or shower program for employees engaged in activities that may directly expose them to benzidine or its salts.</p> <p>*See attachment for abatement requirements.</p>	<p>*Submission of a detailed plan for long term abatement to be submitted to the Area Director at the above address by May 23, 1973.</p> <p>*Complete abatement by July 23, 1973</p> <p>April 30, 1973</p> <p>July 23, 1973</p>

The law requires that a copy of this citation shall be prominently posted in a conspicuous place at or near each place that an alleged violation referred to in the citation occurred. The citation must remain posted until all alleged violations cited therein are corrected, or for 3 working days\*, whichever period is longer.

## RIGHTS OF EMPLOYEES

Any employee or representative of employees who believes that any period of time fixed in this citation for the correction of a violation is unreasonable has the right to contest such time for correction by submitting a letter to the U.S. Department of Labor at the address shown above within 15 working days\* of the issuance of this citation.

\*No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Sec. 11(c) (1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, 660(c)(1).

\*Under the Occupational Safety and Health Act, the term "Working Day" means Mondays through Fridays but does not include Saturdays, Sundays, or Federal Holidays.

14.

Area Director's Signature

Issuance Date: April 23, 1973

(NOTICE: Additional Important Information On Reverse Side)

Form OSHA-1

U.S. DEPARTMENT OF LABOR  
OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION  
Suite 1110A, Federal Building

31 Hopkins Plaza, Charles Center, Baltimore, Maryland 21201

DATE: April 23, 1973

TO: Mr. Page Edmunds, President  
J. S. YOUNG COMPANY  
2701 Boston Street  
Baltimore, MD 21224



SUBJECT: Attachment to Citation #1, issued April 23, 1973;  
CSHO #F-2341, OSHA-1 Report No. 30

ABATEMENT REQUIREMENTS

- 1) Detailed Plan.....this detailed plan for the implementation of the long-term program is to include feasible engineering and/or long range administrative controls and a time schedule of proposed action. Upon acceptance, the plan is to be implemented in accordance with its provisions.
- 2) Complete Abatement.....the date by which engineering and/or administrative controls must be implemented to completely eliminate the employees' exposure to benzidine or its salts. While complete abatement must occur within the specified time period, interim abatement through dedusting of buildings #7 & 7A must occur within 15 working days of the receipt of this Citation.

U.S. DEPARTMENT OF LABOR  
Occupational Safety and Health Administration

## CITATION

M. Robert Daly, Area Director  
Room 1110A, Federal Building  
51 Hopkins Plaza, Charles Center  
Baltimore, Maryland 21201

DATE	FILE NO.	BY
4-23-73	30	73
AREA	REGION	
0050	3	

## OSHA EXHIBIT F

TO: 2.

J. S. YOUNG COMPANY  
2701 Boston Street  
Baltimore, Maryland 21224

3. Citation Number 14. Page 2 of 5, 26  
TYPE OF ALLEGED VIOLATION(S): SERIOUS

7. An inspection was made on 3/8, 12, & 15, 1973 of a place of employment located at:  
8. 2701 Boston Street, Baltimore, Maryland 21224 and described as follows:  
9. manufacturer of aniline dyes

On the basis of the inspection it is alleged that you have violated the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, in the following respects:

10. Item number	11. Standard, regulation or section of the Act allegedly violated	12. Description of alleged violation	13. Date by which alleged violation must be corrected
1	(continued)	<p>d) failed to remove from the chemical storage warehouse one drum of benzidine (salt) showing signs of leakage</p> <p>e) failed to decontaminate Building #7 &amp; 7A in respect to benzidine and its salts.</p>	<p>Immediately upon receipt of Citation</p> <p>*Submission of a detailed plan for long-term abatement to be submitted to the Area Director at the above address by May 8, 1973.</p> <p>*Complete abatement by July 23, 1973.</p>
		*See attachment for abatement requirements.	

The law requires that a copy of this citation shall be prominently posted in a conspicuous place at or near each place that an alleged violation referred to in the citation occurred. The citation must remain posted until all alleged violations cited therein are corrected, or for 3 working days\*, whichever period is longer.

## RIGHTS OF EMPLOYEES

Any employee or representative of employees who believes that any period of time fixed in this citation for the correction of a violation is unreasonable has the right to contest such time for correction by submitting a letter to the U.S. Department of Labor at the address shown above within 15 working days\* of the issuance of this citation.

"No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Sec. 11(c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, 660(c)(1)

\*Under the Occupational Safety and Health Act, the term "working day" means Mondays through Fridays but does not include Saturdays, Sundays, or Federal Holidays.

14. Area Director's Signature *M. R. Daly* Date *April 23, 1973*

(NOTICE: Additional Important Information On OSHA Form 304)

F304 OSHA-2



Senator KENNEDY. We will recess until 10 o'clock tomorrow morning.

[Whereupon, at 12:20 p.m., the committee recessed, to reconvene at 10 a.m., Friday, June 8, 1973.]

## S. 1142—TO AMEND THE FREEDOM OF INFORMATION ACT

FRIDAY, JUNE 8, 1973

U.S. SENATE,  
SUBCOMMITTEE ON ADMINISTRATIVE  
PRACTICE AND PROCEDURE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 11 a.m., in room S-407, The Capitol, Senator Edward M. Kennedy (chairman of the subcommittee) presiding.

Present: Senator Kennedy (presiding).

Also present: Thomas M. Susman, Assistant Counsel; and Ann Landman, staff member.

Senator KENNEDY. The subcommittee will come to order.

First of all I want to express my appreciation for the patience and understanding of our witnesses who moved back their schedules on such short notice. An amendment I proposed on the food stamp program was called up at 10 o'clock this morning, and so it necessitated my presence on the Senate floor. I appreciate your bearing with us.

Yesterday we heard from a diverse group of witnesses, including Senators, media representatives, and lawyers, all of whom saw glaring weaknesses in administration of the Freedom of Information Act over the past 6 years, and all of whom had numerous valuable suggestions for improvement of that important legislation.

Today we have with us a representative of the Department of Defense, which has the record of being one of the busiest agencies with Freedom of Information Act requests—and an agency that some have accused of being an exemption unto itself. We also have four men who have had vast practical experience in dealing with the act, and we certainly look forward to getting their perspectives and suggestions on the record.

I made four specific suggestions in my statement yesterday which are not contained in the legislation before us. I understand that all of you have been supplied with copies of my statement, so I won't repeat the proposals. I do invite your responses to these ideas; and any other ideas you might have.

The first witness is Robert Gilliat.

**STATEMENT OF ROBERT L. GILLIAT, OFFICE OF THE GENERAL  
COUNSEL, DEPARTMENT OF DEFENSE**

Mr. GILLIAT. Thank you, Mr. Chairman. Is it your wish that I read the statement or would you prefer—

Senator KENNEDY. We will file the statement. Unfortunately, we are going to be having a series of roll call votes probably every half hour. So we will include all the statements in the record and hope to have you summarize and hit the high points.

Mr. GILLIAT. Perhaps I should say first that it is a privilege to be here. It isn't usual for those of us at the working level to have an opportunity to appear before a distinguished subcommittee of this kind and offer our views.

Senator KENNEDY. Well, we are glad you are here. I have found that usually we get some of our best testimony, and quite appropriately so, from the people who are in the working part. We thank you very much for your appearance.

Mr. GILLIAT. Our statement is largely negative, I am afraid, because we felt our first job in this situation was to indicate the problems that we saw with the bill that is here being considered, S. 1142.

This should not be construed as any assertion on the part of the Department of Defense that the present legislation is perfect. Indeed, we find many problems with it, and having read last night some of the statements that were received yesterday from your witnesses, I can understand much of the motivation for change that has prompted some of these proposals.

I think, however, that we would say in summary our objections, insofar as they go to the procedural aspects of the bill, we think that it would be unfortunate to place these in a legislative form. We think it would be preferable to give the agencies the opportunity through their own regulations to correct some of these deficiencies, and I think requests from this committee, this subcommittee, or your counterparts on the House side, would be adequate to insure these kinds of procedural reforms.

For example, the time periods which are included in S. 1142 seem to have been taken in part from the recommendation of the Administrative Conference of the United States. I have talked with the author of those recommendations, Professor Giannelli from Villanova, and he is somewhat aghast at the notion of putting these particular time limits into the more or less concrete form of statute.

I think the agency should be given an opportunity to say these times may be too long, they may be too short. I think it would be preferable to allow the agencies to experiment with them through their own regulations, perhaps a uniform regulation for the entire executive branch.

**EXEMPTIONS**

Second, on the substantive and more serious side, I think that the cure for some of the problems that were cited by your witnesses yesterday and have been developed in the course of hearings in the past couple of years are perhaps worse than the diseases that they seek to cure. The amendment to 5 U.S.C. 552(b) (2), for example, in eliminating the opportunity to protect records involving internal



practices and confine that exemption to only those involving internal personnel practices, would have some serious effects in the Department of Defense. We cite as an example the "Defense Contract Audit Manual" which we think it is important to protect. We think it is important that the taxpayers be protected from general dissemination.

We feel that if the second exemption, if I can call it that, were amended as proposed in S. 1142 that we would no longer be able to protect this manual. We doubt that this is the intent of this subcommittee, and we believe that some further consideration should be given to how we might limit the second exemption in a way that protects the interest of the public both as to—insofar as their ability to get information and insofar as they are interested in effective auditing techniques by the Department of Defense and other agencies.

With respect to the amendments of the fourth exemption, 5 U.S.C. 552(b) (4), the language as amended creates problems in that it would leave no opportunity for the protection of information submitted in confidence that did not have a relationship to commercial or financial transactions or trade secrets. We believe that this would not be in the interests of the public, and we do not believe that it is consistent with the expressed intent of Congress when they passed the act. We believe that citizens should be able to confide in their Government. They should be able to tell us of wrongdoing in confidence. We should be able to solicit their views on things such as causes of accidents, such as aircraft accidents, and be able to assure them of confidentiality so that they don't fear recrimination from their employer, and I could go on with examples but I won't take the time.

Senator KENNEDY. On your internal documents, personnel rules and practices, could we just run by again the objections that the Department has in making those available so that we have some kind of a better idea of the way that various agencies themselves work? Professor Davis, as you know, in his landmark article on the FOIA, indicated he thought that was just exceedingly important. I think he used the words "secret law unto itself"—the way that various agencies function and work. And I am just wondering if you would expand on the reasons why that type of material should not be—

Mr. GILLIAT. I am familiar with Professor Davis' objection to "secret law" and I think we are in full accord with that. The "Defense Contract Audit Manual" is in two volumes. One of the volumes is available to the public and this is the volume that contains those things which the public ought to be on notice of in the nature of rule-making or at least interpretation of rules. The second volume, that is protected, is in the nature of internal advice to auditors about techniques, negotiating methods, and if this became available to the contractors, we feel that it would hamper the auditors in their efforts in that the contractors would be forewarned of the methods being employed by the auditors and that this would in the end make less likely effective audits.

Senator KENNEDY. Do all the agencies keep those secret, do you know?

Mr. GILLIAT. I don't know. I know there are like things that are kept secret. I think the Internal Revenue Service has had problems

in this area with some of its manuals. And there is just a recent ruling I noticed in this morning's paper with respect to letter opinions, but that is a different issue, I think.

Senator KENNEDY. So your point on the auditing is that you think that it make your job tougher—you would have to change what you are auditing in reviewing of some of these Defense Department contracts in order to get a handle on the actual cost and cost overruns and on other types of things.

Mr. GILLIAT. Yes. I think what we would have to do so, and we have asked this question—the matter is in litigation at the moment.

Senator KENNEDY. Aren't there certain sorts of boilerplate things that you look for when you do an audit? It seems to me there are only so many things a contractor probably could hide and a good auditor—no matter what the company knew or attempted to do—would be able to his job without difficulty.

Mr. GILLIAT. Senator, you are asking the same questions we asked when the case came up and the answers we received—I am not an expert in auditing, obviously—we were told—

Senator KENNEDY. That makes a couple of us anyway.

Mr. GILLIAT. We were told by the Director of the Audit Agency that these things, of course, were readily available but there were others that should be kept confidential because they would in effect be a "tip-off" to the contractor if they were forced to make the second volume available—maybe the first volume, one of the volumes available, the secret one—they would have to resort to ad hoc advice and internal memoranda or something of that sort in the future, which would be far less efficient and convenient.

Senator KENNEDY. It just seems to me that most of the contractors that are doing business with the Government over any period of time must have a pretty good insight as to what is in that manual, or, in any event, how they are being reviewed, if they are worth their salt. We have got, you know, a number of defense contractors in my own State and they have got a really highly trained group of people who seem to know an awful lot of what is going on and how decisions are made and evaluations are made and reviews are made.

We can move on.

Mr. GILLIAT. The second serious problem that we had, as I indicated, has to do with the fourth exemption because of the inability under this language as proposed by S. 1142 to protect noncommercial and financial information submitted in confidence by individuals, and it seems to the Department of Defense that citizens ought to be able to do this, and we recognize that this exemption broadly stated is subject to considerable abuse. Nevertheless, we feel that it has to perhaps be retained in some limited form in order to insure this.

In fact, under the present language it is extremely doubtful the extent to which such information can be protected once submitted in confidence.

We are particularly concerned about such things as accident investigations which we have managed to continue to protect under the current language but are the subject of continual challenge, and I can understand why.

Senator KENNEDY. Doesn't it imply that the protection is—that there is going to be some kind of recrimination against the individual?

Mr. GILLIAT. Yes.

Senator KENNEDY. Isn't that really the problem, protection so there isn't recrimination. But actually the Department should be commending and rewarding somebody who blows the whistle either because of some accident or some cost overrun or whatever it is. That person's public service should be rewarded rather than having an atmosphere within a department where he is going to be condemned. It seems to me that we are operating from sort of the wrong end of the spectrum on it. It seems to me if an individual had brought matters of either health or safety or savings to the Government's attention, he shouldn't feel that he is going to be threatened.

Now, realistically we know that that has been the case, but it just seems to me that that probably starts at the wrong end.

Mr. GILLIAT. Well, I think you are correct, sir, in indicating that we could attempt to do this. I am not certain, with all due respect, that it is realistic to anticipate that we would be successful in any such efforts. Of course, we would also be talking about individuals outside the Government, a contractor's test pilot, for example. If we wanted him to be candid about the reasons the plane is having difficulty, something of that sort—this might be extremely difficult to protect.

Senator KENNEDY. If a test pilot blew the whistle on an airplane company—

Mr. GILLIAT. If he crashed there wouldn't be a problem. Something of that sort.

Senator KENNEDY. Isn't it enough just to protect his name?

Mr. GILLIAT. Very often he would be the only source of the information and we have been quite successful in the courts in protecting this information under the discovery process, apparently convincing the judges there was a legitimate reason to continue to protect the information.

As I say, I think the language in the fourth exemption should probably be clarified to permit this with some further limitation, perhaps, to avoid abuse, if possible.

In our written statement to the Judiciary Committee we did suggest some specific language, speaking of trade secrets and commercial and financial information, supplemented by a statement "and other information received by the agency in confidence for the purpose of fulfilling an official responsibility."

We are hopeful that "For the purpose of fulfilling an official responsibility" would be something the judge might evaluate should the matter be challenged in courts under the FOIA. If we were misuing it then perhaps we would be forced to release the document. But that was just a thought and the American Bar Association in its statement to the House Subcommittee on Government Information suggested a slightly different formulation, and we think that also has considerable merit.

As to the other substantive change proposed by S. 1142, that of the seventh exemption, and in reference to your statement of yester-



day concerning that exemption. I believe that there probably is a need to limit the investigatory file exemption. I think that is probably demonstrated by some of the testimony or the statements you received yesterday.

I would respectfully suggest again that you might refer to the American Bar Association's administrative law section's recommendations which seek to go to the reasons for protecting investigatory records and in that way limit the use of that exemption. I think if this is done along the lines suggested there, along with a clarification of the privacy exemption, under (b) (6), that we might then be able to satisfy all legitimate interests.

The problem under (b) (6), is that we talk about

personnel, medical and similar files the disclosure of which constitutes a clearly unwarranted invasion of privacy.

Query, is it fair to describe a statement made in an investigation as "similar" to a personnel or medical file? I think we could eliminate that language, just talk of other records which if released constitutes a clearly unwarranted invasion of privacy or just an unwarranted invasion of privacy, then perhaps we could protect witnesses in investigations and perhaps even the subject of the investigation should it turn out that the investigation does not warrant any action by the agency.

I would hope that we might be able to offer our assistance in the discussion of any of these alternative possibilities and we are at the subcommittee's disposal in that respect, and in view of the time—perhaps there is one other area that I would go into, security classification problem—

Senator KENNEDY. Let me ask, just on the investigative files, I guess one House bill to amend the FOIA would exempt "Investigatory records compiled for law enforcement purposes but only to the extent the production of such records would constitute, (a) a genuine risk to enforcement provisions; (b) a clearly unwarranted invasion of personal privacy; and (c) a threat to life."

Would this meet your objectives?

Mr. GILLIAT. Our comment on that before the House subcommittee was that that was a fairly good approach. Now, we feel, however, that the bar association formulation which perhaps I can read here—

Senator KENNEDY. We are going to hear from them on Monday.

#### IN CAMERA INSPECTION OF RECORDS

Mr. GILLIAT. Well, I will assume they will probably repeat the same things and it is just a little different in the description of what we think would be legitimate interests to be protected. These go to both the interests of individuals and the interests of the enforcement process of the agencies.

Since I am from the Department of Defense I suppose I would be remiss if I didn't have something to say about the proposed in-camera investigation by the court of classified material. We understand the effort to modify the effects of the *Mink* decision, but we do not believe, however, that a forced incamera investigation by the court of the record really offers a very adequate solution to the problem. I think that it would be unfortunate to establish the courts as a re-

viewer of classification. I don't think they are well equipped to do this. I think Judge Gessell in his discussion of this problem in *Moss and Reid v. Laird*, a case involving an effort to force release the Pentagon Papers—an unfortunate subject—was effective in explaining the problems of a judge attempting to go through voluminous classified material in order to second-guess the validity of a classification.

The Department of Defense has followed the practice of filing highly detailed affidavits in attempting to demonstrate the validity of the classification. It is our practice when we receive a request for a classified document to obtain a review to see if the document can be declassified and we have in fact declassified on occasion. When we receive voluminous requests as we have from people such as Jack Taylor, it gets to be a considerable burden—that is Jack Taylor of the Daily Oklahoman, who has made a number of requests to the Department of Defense for classified records. Nevertheless, we are attempting to follow the same procedure. This becomes very time-consuming. We feel we are obliged to do so, assuming we think it is validly classified. We seek through the affidavit to demonstrate the relationship of that document to the criteria of the Executive order governing classification and hope to convince the court through that affidavit that the document is classified.

I do not believe that the Department of Defense would object to permitting the judge in some circumstances, rare circumstances, I would hope, to examine such a document should he have reason to believe, grounds to believe, or probable cause to believe, that there may have been an improper classification, but we would think that it would be in the court's interests as well as in the interests of everyone, including the executive branch, not to involve the courts in a wholesale review of classified documents. This might be the result of the proposed change made in S. 1142, section (a) (3).

[NOTE—a statement submitted by Mr. Jack Taylor, referred to above, appears at p. 197.]

Senator KENNEDY. On the question of the examination of documents—why not permit the courts to review the materials just to find out if there is some material in there that could be separated and made available?

Mr. GILLIAT. We favor, in fact, we understand the law requires that we do this. The Horton bill—

Senator KENNEDY. Would you do it or have the courts do it?

Mr. GILLIAT. We would do it, I hope, and do it honestly and say that we have done so. I suppose—if the court had some reason to believe that we hadn't done it honestly and fairly and accurately—then I guess there could be circumstances in which we would agree that it might be appropriate for the judge to examine that material.

Senator KENNEDY. Well, why should then the burden be upon the judge to have to go back to you to request whether you have objection to his examining the material—I mean, what would be the objection to giving him that kind of discretion to review the material initially? If there is some that can be separated without violating the security classification, that—

Mr. GILLIAT. The bill as written makes it mandatory. I think that would be unfortunate. And I think that it would be useful to place

a restraint that there be some cause to believe. I would like to think that a high level official—we normally have these documents, affidavits supporting the classification signed, by a presidential appointee, and I would like to think that the court might trust——

Senator KENNEDY. That becomes pretty routine, doesn't it?

Mr. GILLIAT. That is not our experience. Not routine; very arduous process.

Now, there is room for difference of judgment in these things. Oftentimes the judgment of the executive branch is based on considerable background. The Pentagon Papers case is a perfect example where obviously a great many people differed as to whether some things should have been classified or not. The responsibility nevertheless remains that of the executive branch, we believe, and it would be unfortunate to try and substitute the judiciary for the executive in making those judgments. Such a procedure seems to me to be a flank attack on the classification system and it would be perhaps preferable if there is something wrong with the classification or declassification system that this be approached directly rather than through this means.

Senator KENNEDY. Would you have the same objection if you permitted the judge to just view the material and if he found that there was, let's say, substantial evidence to support a reasonable claim for classification, then there be no further action, but if he failed to find that there was substantial evidence to support it, that at least he would be able to go beyond the claim in terms of examination of the documents?

Mr. GILLIAT. I think we would not like to see that routine and, therefore, I can't see anything to trigger it except some allegation, hopefully, supported by the requester that it was not a proper classification.

Senator KENNEDY. If he did, if he left it to the requestor to raise that, would you object if that procedure was followed?

Mr. GILLIAT. Personally, I don't think I would find that objectionable. I think it is probably a bit unwieldy. I think the Department's position would probably be one of objection.

#### ADMINISTRATIVE BURDENS

Senator KENNEDY. I see. In 1965, as you are aware, the Department objected to the proposed Freedom of Information Act, and talked about how burdensome and costly it was going to be. Could you describe what has been the situation in the Department since passage of the act?

Mr. GILLIAT. I think I would have to say in fairness that the net benefit—the net effect of the act has been beneficial, primarily from the standpoint of having created a presumption in favor of release rather than perhaps in favor of withholding, if there was any question. I think there have been numerous difficulties in interpretation of the language and I think some of our criticisms of that language have proven to be accurate and, of course, I think that is one of the reasons we have proposed modification now, because some of that language was not as well chosen as it might have been.



Senator KENNEDY. What about the allocation of fees, court costs, and attorneys' fees, to plaintiffs in actions brought under the FOIA?

Mr. GILLIAT. We have a little bit of concern that this will promote litigation unnecessarily and I am sure that the Justice Department will want to elaborate on that. Personally I think that under certain circumstances this would be justifiable, and as we said in our statement or in our report—I can't remember which—if the Congress should feel that this should be put in, they would also make some legislative history to the effect that this should not be done when this is a contest between two private parties as between Lockheed and General Dynamics, for example, one trying to get the other's records for purposes of profit. Of course, it is discretionary with the court as I understand.

Senator KENNEDY. Of course, if the plaintiff is successful, then it isn't a spurious case.

Mr. GILLIAT. No, it isn't spurious, but we in good faith perhaps have attempted to protect Lockheed's records, feeling they were legitimate trade secrets, from General Dynamics. I don't think we have ever had that case but we have had cases like that, and in good faith have tried to honor our commitment to keep them confidential. The courts decide if they are not legitimate trade secrets, something like that.

#### INTERNAL MEMORANDA

Senator KENNEDY. Let me ask you about the internal memorandum exemption. Suggestions were made yesterday that it be either restricted or even eliminated. Would you tell us what your thoughts are on that.

Mr. GILLIAT. I feel to put a time limit on the internal memorandum exemption would probably be a mistake, at least in statutory form. I believe that this certainly should be a factor in evaluating whether any legitimate or significant purpose is served by withholding the document under that exemption.

I might say here parenthetically that it is my experience in the Department of Defense that most of the documents that are released on appeal that I have become familiar with are released because no legitimate or significant purpose would be served by withholding them without much real consideration of whether an exemption is applicable or not.

It isn't necessary to get into the technicalities of the exemption if we don't have any good reason for withholding it. But I think that there are internal documents, memoranda, letters, that perhaps even after the passage of time should be legitimately protected. If not, I am afraid people will start writing their memoranda with a view toward how they will appear in public.

I realize that is a classic argument, a little platitudinous, but I think there would be some validity to it.

Senator KENNEDY. What will that be? I mean how will that really vary? How do you think memo writing would change if the memos are going to be made public?

Mr. GILLIAT. I think an individual will probably word his recommendations very carefully. I think it will make for more drafts of documents because one will have to consider how they are going to appear in public should they be released. I think some information will be omitted from the memorandum and it will be reported orally and I think for the purpose of future bureaucrats, officials, etc., that this may make it difficult for them to understand how a decision was made.

As I say, in many cases I think you are quite right. I can think of a study that was done for us, for example, on polygraphs, perhaps 6 or 7 years ago. There was a request for this study. It did contain recommendations, no question about it, and the thought was that perhaps it should be withheld.

On examining it we thought that while technically it may fall within the exemption, that after this passage of time, there was probably no good reason—no legitimate purpose would be served by withholding it, and we did release it to the reporter who made the request. I understand as a result it got half of a sentence in a very lengthy story he wrote where otherwise I am sure he might have though there was something in there that really wasn't. But as a matter of personal knowledge this is taken into account.

Senator KENNEDY. Let me ask you a personal question. Don't you at the time you write a memorandum assume there is a chance it might be published, given the track record of Jack Anderson and Senate Committees—

Mr. GILLIAT. Since I am in the General Counsel's office I am inclined to think that probably the legal memoranda are withheld more successfully than others. It has not been our experience that most of these or that many of these have escaped to Jack Anderson. Of course, we have the traditional lawyer-client relationship here going for us and there is some protection. I don't think we even put "For Official Use Only" on our memoranda.

Senator KENNEDY. Who is your client? Is it the Department?

Mr. GILLIAT. Well, I think that raises an interesting issue, whether the lawyer-client privilege really applies here. Our client would, of course, be the Assistant Secretaries, for the most part, within the Department, within the Office of the Secretary of Defense.

Senator KENNEDY. But isn't it to the people themselves or—

Mr. GILLIAT. Well, yes. I am aware of that argument and I certainly agree that that is something that should—the interests of the public is something we are always trying to serve in giving advice to the Assistant Secretaries or the Secretary of Defense.

Senator KENNEDY. Very good. Well, thank you very much for your statement—if you can remain with us during the morning it would be helpful. There might be some further questions. We might get your reactions to some of these proposals.

Mr. GILLIAT. Thank you, sir.

[Prepared statement follows:]

STATEMENT BY MR. ROBERT L. GILLIAT, OFFICE OF THE GENERAL COUNSEL,  
DEPARTMENT OF DEFENSE

Mr. Chairman and Members of the Subcommittee: I appreciate the opportunity to appear before you today to present the views of the Department of Defense on S. 1142, which would amend section 552 of title 5, United States

Code: the so-called "Freedom of Information Act." These comments are substantially identical with those presented by the General Counsel of the Department of Defense, Mr. J. Fred Buzhardt to the Subcommittee on Foreign Operations and Government Information, committee on Government Operations, House of Representatives, on May 8, 1973.

I will confine this statement to the issues that are of greatest concern to this Department. Additional technical points regarding S. 1142 are included in the written report submitted to this Committee, on behalf of the Department of Defense.

Most significantly, the Department of Defense strongly opposes the major substantive modifications of the second, fourth, and seventh exemptions (5 U.S.C. 552(b)(2), (4), and (7)), as well as the unequivocal and inflexible time constraints for answering requests and complaints that this bill would impose on the agencies. In addition, the proposed requirements for the maintenance and the reporting to Congress of data on some Freedom of Information Act requests for records would be highly burdensome, not very useful, and perhaps misleading.

Specifically, we oppose the proposed modification of the second exemption (5 U.S.C. 552(b)(2)) to limit its applicability to only those "internal practices" which come within the description of internal *personnel* practices." There are many non-personnel, internal practices that should continue to be protected from disclosure to any and all who may request the records in which these procedures are set forth. The *Defense Contract Audit Manual* is a prime example of the kind of record which should not be available outside the Government. The Defense Contract Audit Agency has determined that public release of this *Manual* must be avoided if the Agency is to fulfill its responsibility for auditing Government contractors' records in an effective manner and thereby better insure protection of the taxpayers' interests.

Because this *Manual* is related to the internal practices" of the Audit Agency, it cannot fairly be characterized as relating solely to internal personnel practices." Yet, I cannot believe that this Subcommittee, the Committee on Judiciary, or the Congress as a whole, would wish, by restricting the applicability of the second exemption in the manner proposed in S. 1142, to hamper the Audit Agency in the performance of its important public-interest functions.

There are numerous other Department of Defense records that come within the ambit of "internal practices," but *not personnel practices*, that cannot be made available to the public without serious disruption of the operations of the Department of Defense. We agree with the position of the American Bar Association that the preferable amendment of this section is the deletion of the word "personnel" so that all records concerning "internal practices" can be withheld if their disclosure, in the words of S. 1142, "would unduly impede the functioning of such agency." The limitation that would result from adoption of this quoted language from S. 1142 is reasonable and consistent with present Department of Defense regulations and practices.

The proposed modification of the Fourth exemption (5 U.S.C. 552(b)(4)) is objectionable because it would make even more difficult than under the current ambiguous language of the fourth exemption the responsibility to carry-out the clearly expressed Congressional mandate of insuring that the traditional evidentiary privileges, such as doctor-patient, lawyer-client, and priest-penitent, are preserved, along with a guarantee to every citizen of his right to communicate with his Government in confidence. The revised language in S. 1142 would limit the protection of "privileged or confidential" records to those which are trade secrets, or which contain commercial or financial information. No language would remain under this exemption by which an agency could justify withholding non-commercial or non-financial records containing information submitted by private citizens, members of the armed forces, and civilian employees to their Government, or its officers, in confidence.

The inability to protect such information from public disclosure would have the effect of discouraging potential sources from providing valuable information about accidents, about improper agency activities, the conduct of superiors, or countless other sensitive matters of proper official concern. Thus, the net effect of the proposed revision would be contrary to the public interest and actually make more difficult the discovery or development of relevant information about the operations of government agencies or about correctible safety problems.



The proposed revision of the seventh exemption (5 U.S.C. 552(b)(7)) is perhaps the most objectionable of all the substantive changes contained in S. 1142. First, it is objectionable because of the ambiguous effect of the apparent intent to limit the applicability of the exemption to investigatory records compiled for any "specific law enforcement purpose." We frankly do not know how alleged abuses under the present language of the seventh exemption would be cured by this modification. Any investigation conducted for a law enforcement purpose has a specific law and "specific" purpose in view. Otherwise, there would be no investigation because there would be no justification for conducting it. If the intent is to limit the exemption to those investigations focused on particular individuals or organizations against whom some law enforcement action is contemplated, then we believe that the result will be injury to innocent parties and a serious hampering of the investigative process. Those who possess relevant information about suspected deviations from proper enforcement of laws will be reluctant, if not totally unwilling, to disclose fully and completely that information to Government investigators if they cannot be assured of its confidentiality. This consideration is even more acute if the inability to protect the information results from the failure of the investigation to confirm any law enforcement violation or to settle on any particular violator. The consequence of this change, therefore, may be that violations of law will go undetected, uncorrected, or unpunished.

The second serious deficiency in the proposed revision of the seventh exemption is that it will deny agencies the discretionary right to protect investigatory records compiled for the purpose of enforcing health, safety, and environmental protection laws, as well as investigatory records containing the results of scientific tests, reports, or data. Very often the success of an investigation concerning health, safety, or environmental protection depends on the cooperation of the employees of the organization being investigated. It is unrealistic in many situations to anticipate that the investigator will obtain complete and candid information from these employees if he cannot assure its confidentiality. The likely diminution in information can only have the effect of poorer investigations and poorer law enforcement to the detriment of all who are dependent on the health, safety, or environmental protection involved in the investigation.

Since the Bill contains no definition of the term "scientific," it is impossible to determine the total adverse impact on this Department's ability to protect from public disclosure to "any person" every scientific test, report, or datum developed in the course of a law enforcement investigation. Blood tests, urine samples—even polygraph results—may be unprotectable. The unfair effect on the reputations of both the innocent and not so innocent persons or organizations, resulting from the revelation of various aspects of an incomplete, inconclusive, or even exculpatory investigation is too apparent to belabor. Moreover, the potential detrimental effect on an ongoing investigation caused by the premature disclosure of "scientific tests, reports, or data" alone should provide sufficient justification for those interested in vigorous law enforcement to reject this provision of S. 1142.

Although we agree that an agency should publicly announce the basis for its public policy statements and rulemaking actions, we cannot agree that investigatory records concerning particular individuals and organizations should always be available to the public simply because they stimulated a rulemaking action or a public policy statement. A particular law enforcement investigation may still require protection even though its results may have caused the agency to take corrective action of general applicability. The resulting public policy statement or rulemaking should stand on its own rationale, independent of any related investigatory record. To the extent that there are deficiencies in the rulemaking process, we recommend that they be corrected by amending those sections of the Administrative Procedure Act that specifically address this activity. By contrast, amendment of the seventh exemption of the Freedom of Information Act as a means of addressing this rulemaking issue may interfere with other worthwhile objectives.

If amendment of the seventh exemption is considered desirable we recommend consideration of the language suggested by the American Bar Association in the statement presented on May 16, 1973, to the Subcommittee on Foreign Operations and Government Information, Government Operations Committee, House of Representatives. The limitations which this language

would impose on the employment of the seventh exemption are compatible with most of the concerns that motivate the Department of Defense in its efforts to withhold some investigative records from public disclosure.

With respect to the administrative and procedural requirements that would be imposed on the agencies by S. 1142, we believe that they are for the most part unworkable and undesirable. By contrast, the Department of Defense has endorsed Recommendation No. 24 of the Administrative Conference of the United States, which offers more realistic proposals for improved agency implementation of the Freedom of Information Act. These provisions have been incorporated almost totally in a draft revision of Department of Defense Directive 5400.7, which has been circulated among the various components of the Department of Defense for comment or concurrence. We are also likely to seek public comment on the proposed revision by publication in the Federal Register. Whether promulgation should await a determination of whether any of the bills currently being considered by Congress to amend the Freedom of Information Act are to be adopted, most also be evaluated.

More specifically, the Department of Defense strongly opposes the requirement in S. 1142 that initial requests under the Act be *determined* within ten working days, appeals in twenty, and that complaints filed in the U.S. District Court be answered within twenty calendar days. In an agency the size of the Department of Defense, with millions of records all over the world, meeting such requirements would simply be impossible.

Hence, these unrealistic time limitations would mean that we would have inadequate opportunity to evaluate the difficult requests, or even to locate some records to determine whether they can be released. This can cause requesters to initiate unnecessary litigation, which will only serve to shift evaluative burdens from the agencies to the already-overburdened courts. Moreover, evaluation by the court is limited to a determination of whether the record comes within an exemption. By contrast, the agencies also evaluate whether reliance on the exemption serves any legitimate and significant purpose. It is our experience that more often than not the decision to release a record is made on this basis, rather than because an exemption does not apply. If the agencies have inadequate time to make these discretionary determinations, those seeking release may be put to unnecessary trouble and litigation expense.

Another problem under any statutory time limitation for responding to Freedom of Information Act requests is created when the desired record has a security classification and is more than ten years old. Such records are currently reviewed upon request for declassification under procedures established by the Departmental regulations that implement E.O. 11652. We believe those procedures are sound, but, because of the right to appeal adverse decisions, they do not permit compliance within the proposed statutory deadlines for substantive response to requests for their declassification and release under the Freedom of Information Act. Separate time limitations are imposed, however, under the regulations establishing these declassification review procedures for documents over ten years old.

Further, under the terms of S. 1142 the courts would be obligated to make their judgment in Freedom of Information cases without the benefit of a carefully considered and prepared Government answer because of the requirement that it be filed within twenty days of receipt of the complaint by a U.S. attorney. Although we believe that Freedom of Information cases are important, we do not concur in changes which require that they be given priority in the filing of an answer over every other type of adjudication. Yet, the severe time limitations on the agencies do not assure the requester a prompt hearing or judicial determination on the availability of the record. This still remains within the court's discretion, a discretion which they may exercise under the present language of 5 U.S.C. 552(a)(3) to insure that Freedom of Information cases take precedence over all other cases." We favor the flexibility that is inherent under the current language of section 552(a)(3), title 5, United States Code, by which the judge may evaluate the particular facts of the case determine whether it merits expeditious consideration over other cases. A similar flexible, discretionary approach may be appropriate with respect to the time for filing answers.

Similarly, the flexibility of the courts would be unacceptably limited by the requirement of S. 1142 that the judge examine in-camera any agency record which a complainant has been denied. We believe, as the U.S. Supreme Court

stated in *Environmental Protection Agency v. Mink* (93 Supreme Ct. 827 (1973)), that a court should have the discretion of satisfying itself by whatever means it deems appropriate that the agency has sustained its burden of demonstrating that the withheld record falls within a statutory exemption. This can be accomplished by modifying the language in section (d)(1) of S. 1142 to insert in the third sentence of section 552(a)(3) after the court shall determine the matter *de novo*," the clause and may, in its discretion, examine the contents of any agency records in-camera to determine if such records or any part thereof may be withheld under any of the exemptions set forth in subsection (b), with the burden on the agency to sustain its action."

We are particularly disturbed by a requirement for in-camera inspection as it would be applied to records which are classified for security reasons under Executive Order 11652. The judge is in a poor position to second-guess the validity of a security classification, and an *ex parte* procedure where the agency explains the justification for the classification to the judge is not satisfactory to either the requester or the agency. One U.S. District Court judge has opined that such a procedure is contrary to the traditions of our judicial process insofar as it denies the requester an opportunity to present his arguments on the validity of the classification. It is objectionable to the agency which often must rely on additional classified information to justify the classification of the requested document. It is, therefore, preferable to permit the agencies to allow a procedure by which they support the withholding of a classified record with a detailed affidavit explaining to the court the relationship between the information withheld and the criteria by which it was classified under Executive Order 11652. This affidavit procedure is well-established as a means of resisting discovery under the Federal Rules of Civil Procedure and has been expressly recognized by the Supreme Court (*Reynolds v. United States*, 345 U.S. 1 (1953)) as an appropriate method of assuring the court that classified and other privileged information should not be disclosed.

Finally, we believe that section 4 of the bill relating to the reporting requirements is unnecessary, as well as unwise in some of its terms. A simple request from the Committee on Judiciary, U.S. Senate or from a committee of the House of Representatives to each agency for the compilation and submission of data on Freedom of Information requests would undoubtedly be sufficient to insure compliance. If, however, such a request is made, and particularly if it is incorporated in legislation, we urge that it be modified to delete the requirement for maintaining statistics on the total number of requests for records made under the Freedom of Information Act and for the number of days taken by each agency to make initial determinations on any such requests.

In addition to being burdensome and costly, this requirement is not likely to be helpful to Congress or the agencies in assessing compliance with the Freedom of Information Act. Indeed, it may be misleading because the Department of Defense, like other agencies, presumably would be required to report all requests for records regardless of form or regardless of reference to the Freedom of Information Act. Most of these are routine, and the records are provided without any consideration of the applicability of the Freedom of Information Act. Consequently, the resulting statistics would prove little or nothing. Compliance with the Act is best judged only with reference to those cases in which there has been an initial or final denial of the requested record. Consequently, we recommend that any request or requirement for reporting be limited to these troublesome cases.

I recognize that much of what I have said about this bill is critical. This is not intended to imply that improvements in the language of the statute, as well as in its implementation by the agencies, are not in order, but I am constrained to say that several of the revisions proposed in S. 1142, are in my judgment, likely to prove counterproductive should they be enacted.

Recently, there appeared an article in the *Maryland Law Review* (Volume XXXII, No. 3), entitled: *The Freedom of Information Act: Suggestions for Making Information Available to the Public*, written by Mr. Charles H. Koch, Jr., an attorney in the Office of the General Counsel, Federal Trade Commission, which in my opinion merits the attention of this Subcommittee. Mr. Koch discusses many of the problems of great concern to the Department of Defense, and which, we believe should be of concern to this Subcommittee. Although I do not agree with all of Mr. Koch's observations, nor with all of his recommendations, I believe that he has attempted to offer constructive



solutions to most of the more serious Freedom of Information problems. Similarly, the discussion of the Freedom of Information Act found in the 1970 Supplement to Professor Kenneth Culp Davis' Treatise on Administrative Law contains many worthwhile observations about difficult interpretation problems under the language of the Act which deserve the attention of this Subcommittee and the entire Congress.

With reference to the more specific Freedom of Information Act issues raised by the proposed amendments contained in S. 1142, H.R. 5425, and H.R. 4960, 93d Congress, we believe that the highly constructive statement by the Chairman of the Administrative Law Section, American Bar Association, Before the House Subcommittee on Foreign Operations and Government Information, offers comments and suggestions for modification of the law that could prove beneficial to the public and would not, for the most part, raise serious objections by the Department of Defense. I hope that the Subcommittee will give serious consideration to the views of the American Bar Association on S. 1142.

For its part, the Department of Defense is willing to provide whatever information or whatever other help it can to illustrate our concern with the operation of the Act as presently written and with the proposed revisions. We believe that improvements should be made, and we stand ready to contribute to the effort which is necessary to their accomplishment.

I am ready to answer any questions you may have on our response to this bill.

Senator KENNEDY. The most convenient way I think and expeditious way would be if we have our next four witnesses come up together since they all have broad experience working with the FOIA.

Mr. Harrison Wellford was formerly the executive director of the Center for the Study of Responsive Law, and is now a consultant on the environment, food safety, and other regulatory matters. He is the author of numerous articles and books, including a study of the Department of Agriculture, and he has gone to court against that agency under the Freedom of Information Act.

Mr. Robert Ackerly is a former assistant U.S. attorney in Washington, D.C., and has been in private practice here since 1954. He is counsel in a number of Freedom of Information Act cases.

Mr. William Dobrovir has worked with Ralph Nader and the Lawyers Committee for Civil Rights Under Law. He is now in private practice.

Mr. Benny Kass was counsel to the Senate Subcommittee on Administrative Practice and Procedure during the time of passage of the Freedom of Information Act and has been active on freedom of information matters since he began private practice in this city.

We welcome you, gentlemen. Maybe Mr. Wellford—I understand you have got time problems. Do you want to start off, and then Mr. Ackerly.

#### **STATEMENT OF HARRISON WELLFORD, CENTER FOR THE STUDY OF RESPONSIVE LAW**

Mr. WELLFORD. I appreciate the opportunity to present my views this morning.

Let me start off by saying there is no question that the Freedom of Information Act has led to great advances in expanding public access to information. One of the very first experiences I had in Washington was going over to the Federal Trade Commission in 1968 and asking to see a copy of their organization chart and I was

told that the organization chart was not available to me because it was an internal memorandum.

Later on when we suggested that this basic description of what the FTC was doing could not really be an internal memorandum to be withheld from the public, they wanted to charge us a search fee for finding it.

Well, things have changed a lot since then. The attitude toward public information in the FTC and in the EPA, and to some degree in the FDA has improved substantially since 1969. But still I think the basic problem with the intention of the act remains and that is that the Freedom of Information Act basically helps the public-interest law firms, the regulated industries, and other organized interests that have legal resources to challenge denials in the courts. It has not been that much help to the average citizen who simply wants to know more about what his Government is doing. This goal, the idea of creating a more informed electorate, was foremost in Congress' mind in passing the Freedom of Information Act.

There is no question that citizens' demands for information about the impact of Government on their lives is probably greater now than ever before and we can't be satisfied just because the public-interest groups have begun to win a number of law suits. We have got to think about ways in which the whole process by which information is organized, stored, and retrieved can be improved to facilitate the average citizen's access to information.

I have a long statement here in which I describe some of the ways in which I think these reforms can take place and I won't take your time by reading it. Let me simply summarize some of the main points if that is all right.

Senator KENNEDY. We will have your statement in its entirety put in the record.

Mr. WELLFORD. Thank you.

The first point which I will just touch on briefly, because I think it is a point you have heard many times before, is that the only sanction for a denial of information is going to the courts. There is no black mark that goes on an agency official's record if he illegally withholds information. There is really nothing that the person who is denied information wrongfully can do except to get a lawyer and pay the expenses of going to court.

Now, there are two things to keep in mind here. First, the record of cases taken to court is overwhelmingly against the Government. Of 99 cases decided by the courts between 1967 and 1971, the Government's refusal to release information was sustained in only 23 cases.

The Center for Study of Responsive Law which I represent has brought 15 cases and we have won 13 in 3 years. Our attorney, Ron Plessner, has a legal batting average which would humble Clarence Darrow but this kind of litigation is a luxury few citizens can afford. Even a simple case costs \$1,000. One case I was involved in, *Wellford v. Hardin*, which we ultimately won in the court of appeals, would have cost at least \$10,000 if we had had to pay legal fees for us to have carried this case. Therefore, I would urge that the courts be given the discretion to allow successful plaintiffs in the

Freedom of Information Act case to recover reasonable attorney fees and other costs.

There should be a certain burden on the successful plaintiff to demonstrate that he does need reimbursement, a condition which would eliminate the problem of reimbursing Lockheed another obviously solvent plaintiff.

Second, the problem of delay. Again this has been widely commented on in both these hearings and the hearings before the House. I fully endorse the concept of establishing some finite period of time within which the agencies must respond to requests for information. Whether that time period should be 20 days or 30 days I am not prepared to say but I do know there has got to be some kind of temporal discipline if the act is going to be successfully enforced.

#### COSTS AND FEES

Third, the problem of cost of access. Here is something that really cuts against the individual citizen as opposed to organized interest groups. The search and copying fees which Congress allows agencies to charge have really become toll gates on public access to information. This is not what Congress intended. This is a minor housekeeping function that unfortunately has been greatly abused by many Federal agencies. Great variation in copying charges, for example, 5 cents a page at the Department of Agriculture, up to \$1 a page in various other agencies, a charge of 25 cents a page for Xeroxing, is common. The clerical research charges can be extraordinary. We were asked to pay once a fee of \$85,000 for the search fee to get some records that we requested from the Department of Agriculture.

If the Department were here they would say, well, Mr. Wellford's request was not specific enough so we had to go searching through our records and it took us a long time to do that. The problem is that I was faced with a "Catch-22" situation. The only way that I could make my request specific was to get access to the indexes by which these files were recorded. When I asked for access to the indexes, I was told that they were internal memoranda, and not available to me. Therefore, I had to make my request in a broad fashion and they came back with a bill for \$85,000 which we regretfully had to turn down.

Senator KENNEDY. Do you think Congress ought to legislate guidelines on the cost of getting information?

Mr. WELLFORD. I think that Congress ought to develop guidelines to make the costs uniform, to allow for waiver in the case of need, and to consider ways in which the costs can be reduced to the point where they are really not burdensome. I think if the Government has to take a loss in its Xeroxing charges, that is probably a price they ought to pay in the interests of freedom of information. There is no uniform system yet that has been introduced.

I know that the Office of Management and Budget has considered doing something like that but nothing has resulted from it. I think it would be important for Congress to consider ways in which that can be done.

[See materials relating to OMB guidelines on search and copy fees, Appendix, Volume III of these hearings, Freedom of Information.]



## INTERNAL MEMORANDA

A brief comment on public access to internal memoranda. Again I go into a long discussion of this point in my testimony. Just to dispense with it quickly, I would say that I do endorse the idea of establishing a statute of limitations, say 2 years, for example, after which internal memos would be made public.

The courts would still have the authority to protect certain classes of information, for example, where release would affect national security, law enforcement or personal privacy, but the perpetual protection of documents merely because they are internal would no longer be allowed.

Senator KENNEDY. How do you respond to this point that is raised that people will not get the really frank and candid advice that they should if these matters would be subject to subsequent disclosure?

Mr. WELLFORD. Well, I think that you answered that question pretty well a few minutes ago. Maybe I am biased by working for the Nader organization, but anyone who thinks he can write a memorandum on substance that is going to be forever protected from leaks to the public is crazy. I think that any good staff man is going to be aware of that when he is writing memoranda anyway. Unfortunately, this exemption does not impose any kind of discipline on the staff men. I think if they realize that ultimately their internal documents were going to be made public they would be less likely to make special pleadings for vested interests. They would be much more concerned about arguing issues on legitimate factors of policy and not yielding to some more narrow, parochial interest.

Let me go to two more points I want to make. The Freedom of Information Act as good as it has been, still doesn't legislate out of existence the natural instincts of secrecy that exist in bureaucracy, not just the Federal Government but in any bureaucracy. There is an innate contradiction between openness and bureaucracy. I think we ought to give a little consideration to ways that incentives for openness can be worked into the standard operating procedures of the agency.

Now, this committee has proposed that all officials involved in the denial of information should have their name go on some sort of public record so if you have a pattern where one pathologically secret individual is denying information everyday, that at least he might be subject to a little public criticism. I have a little more problem with the idea of imposing actually criminal sanctions against individuals who wrongfully withhold information. But primarily I think that we ought to recognize that right now the whole process by which requests for information are met is simply an ad hoc added-on function within the bureaucracy. There is no special staff that has developed greater expertise to handle these requests. The job of information retrieval is a burdensome job which somebody who is in the process of carrying on his daily work suddenly has to stop and do something about.

Now, I suggest that there should be specific appropriations for meeting the public information responsibilities of the agencies. And

secondly, that each agency should have a public information center where public and exempt information is indexed for public review. The index of withheld documents should include the reasons the agency considers them exempt under the act.

Now, this system may seem rather prosaic but I think that it would lead to very practical advantages for the citizen who is seeking information. In the first place, by forcing the agency to specify reasons for withholding documents, it creates incentives for release. The citizen could still sue if he felt that the reasons were inadequate. Most important of all it forces the agency to make most of its policy decisions about release of documents in advance of requests and this eliminates delay.

#### PUBLIC INFORMATION AND COMPUTERIZATION

Finally, an issue that I think has not been dealt with in the House hearing and to my knowledge not in the hearing before this committee is the implications for public access of computerization of records in the agencies.

The Federal Government over the last decade has increasingly converted its files from manually handled eye-readable records stored in drawers and filing cabinets to automated machine-readable forms stored within computer central processing units or off-line discs, tapes, and microforms.

Now, there is no question that computerization is a development that on the whole we should welcome. The problem is that it is a two-edged sword. It can cut either for or against public access depending on who is wielding it.

I am concerned that this process of adapting computer technology to the storage of information is going on at a rapid rate without any oversight by Congress, by the public interest groups and scholars. The reason that this is alarming is that once these systems are set up with, let's say, narrow concepts of bureaucratic efficiency or secrecy in mind, it is going to be very difficult to change them if we suddenly find that rather than facilitating public access to information they are shielding governmental secrecy. In other words, the time is late for public attention to this issue.

Now, Professor Alan Westin of Columbia University has done a study of the implications of computerization for the Freedom of Information Act and I would suggest that that study be made a part of the record of the hearing when it is available. I would urge this committee to investigate the degree to which executive agencies have considered problems of public access to information when they have automated their records. Agencies should be required to give public notice when they plan to introduce a new computer system and to provide Congress and the public with an impact statement on the system's Freedom of Information Act implications. Public advisory committees should be established in each agency to give guidance on the ways in which the computer system can be designed to advance the goals of public access.

Thank you.

Senator KENNEDY. Very good. Very helpful.

Just a couple of questions.

Mr. Mazzocchi of the Oil, Chemical and Atomic Workers made a proposal about providing a specific exception to the exemption on investigative files as it applies to health and safety matters because of their particular urgency. Do you have any reaction to that? I know you spent a good deal of time in this area.

Mr. WELLFORD. He would favor—

Senator KENNEDY. Disclosure.

Mr. WELLFORD. Right.

Senator KENNEDY. Because of the particular kind of problem that they are facing. He mentioned some very severe health problems with some of their workers, and because they worked particularly in an atomic plant or something, they were unable to find out what particular gas or substance was affecting them, so they couldn't do anything about it.

Mr. WELLFORD. Right.

Senator KENNEDY. I am just wondering whether you had any reaction at all given the fact that you spent a good deal of time—

Mr. WELLFORD. I think there are several considerations here. I don't think that Mazzocchi would be interested in releasing these files if he felt that it might prejudice the government's action against some wrong-doer. But as the present law reads, partly as a result of one of the cases that we brought, the data in these files is available to the public where premature disclosure of the government's case is not involved.

The difficulty is that distinguishing data that might compromise a source or might result in premature disclosure from data that does not have these problems is very complicated, and as a result, the agencies are extremely reluctant to breach this exemption at all. Even after the legal precedents which help us support our claim that investigative files should be revealed, we found that we really have to provide legal challenges for practically every request.

Now, I would say that in the area of food safety, environmental protection, worker safety, that there are more compelling reasons for some disclosure of data in these files than in many other areas. I would basically endorse the expansion of disclosure here. The problem is how do you develop capabilities within the agency to decide which of these files really ought to be revealed and which might result in disclosure of the government's case. I think that that goes back to some of the reforms I was suggesting in my testimony. If you leave these decisions to be made only at the point of the request, Mr. Mazzocchi is going to be waiting around for years to get the data that he needs right now to protect his workers.

So I think that there ought to be ways that the agencies can be encouraged to attack this problem right now in advance of specific requests for information.

Senator KENNEDY. What about the problems that are faced by the agencies on global requests, you know, the desire to get all the different kinds of material and reports on a given topic or subject matter? How would you adjust to that—in terms of trying to get a standard on cost and expense or research time? Do you have any particular way of trying to approach that?

Mr. WELLFORD. Well, if the data that the government holds were indexed in a way that the citizens could go into a library kind of setting and look through the indexes and therefore frame much



more specifically the kind of requests that they are going to make, these large global kinds of requests would be reduced. I think that is one basic step to take, if that is the question that you are asking me.

Senator KENNEDY. Well, I mean, if there is a broad request, should there be more time to respond, to answer it?

Mr. WELLFORD. The question is, Senator, how you decide what is global and what is very specific and I am afraid it is very difficult to see how one would develop guidelines there. I am generally in favor, as you can tell from the testimony, of trying to take some of the burden of this decisionmaking off the government by allowing the citizens to frame some of their questions more specifically in advance. Right now that is simply not possible.

Senator KENNEDY. OK. Thank you very much, Mr. Wellford. Very helpful comments.

[The prepared statement follows:]

#### TESTIMONY BY HARRISON WELLFORD, CENTER FOR STUDY OF RESPONSIVE LAW

Mr. Chairman, I appreciate your invitation to give my views on the Freedom of Information Act before this subcommittee. My name is Harrison Wellford and I am a consultant to the Center for Study of Responsive Law. In the last four years, as a writer, investigator, and litigant, I have explored the scope of citizen access to government information in the areas of food safety and environmental protection. With my attorneys, I have brought and won several suits under the Freedom of Information Act.<sup>1</sup>

The Freedom of Information Act has brought great advances in public access to government information, but for the most part the beneficiaries have not been the average citizen, the press, or scholars but those organized interests with the legal and lobbying resources to develop special relationships with federal agencies. The great majority of the roughly 200 cases brought under the Freedom of Information Act have been by private corporate interests which use the Act as a substitute for discovery. The second largest litigant class under the Act is the public interest community. The press has used the Act rarely and the average citizen, without a Washington-based organization to back him up, has used it hardly at all.

While legal victories by these organized interests have often benefited the general public, they have not led to substantial reforms in government information policy which would expedite the average citizen's requests for information.

This is not what Congress intended in passing the Freedom of Information Act. In deliberate contrast to the public information section of the Administrative Procedures Act, which aimed to improve the equity and efficiency of the administrative process, the Freedom of Information Act aimed at improving the electoral process by helping to create informed voters. Sweeping all standing requirements aside, the Act specifically permits "any person" to request government records, not just those special interests "properly and directly concerned" with an agency action, as under the Administrative Procedures Act. As Charles Koch recently concluded in the *Maryland Law Review*, "this change in language indicates a shift of emphasis from providing access to citizens directly affected by an agency action to establishing a more informed electorate—an opening of the bureaucracy to any interested citizen."<sup>2</sup>

This purpose of the Act—to protect the right of the average citizen to learn what his government is doing—was expressed eloquently by the Attorney General, in a Memorandum prepared in 1967 summarizing its provisions:

"If government is to be truly of, by, and for the people, the people must know in detail the activities of government. Nothing so diminishes democracy as secrecy. Self-government, the maximum participation of the citizenry in

<sup>1</sup> *Wellford v. Hardin*, 444 F. 2d 21 (4th Cir. 1971) in which the Circuit Court of Appeals required the Department of Agriculture to make available various enforcement data on meat packers suspected of violating federal meat and poultry laws; and *Wellford v. Hardin*, USDC, DC, Civil No. 740-70 (1970) which required the Pesticide Regulation Division to make some pesticide files available to the public.

<sup>2</sup> Charles H. Koch, Jr., "The Freedom of Information Act: Suggestions for Making Information Available to the Public," *Maryland Law Review*, Vol. 32, No. 3 (1972), p. 195.

affairs of state, is meaningful only with an informed public. How can we govern ourselves if we know not how we govern? Never was it more important than in our times of mass society, when government affects each individual in so many ways, that the right of the people to know the actions of their government be secure."

In 1973, when an excessive regard for secrecy and the crimes committed in its name have tainted the highest levels of government, these words have a truly prophetic ring.

Unfortunately it takes more than mere words on paper to change years of ingrained habit and most Federal agencies continue to have a two-pronged information policy—one toward organized groups, chiefly regulated industries but increasingly public interest groups with legal resources, and one toward the individual citizen. There are three primary reasons for this policy: reliance on the courts to enforce the Act, the costs of gaining access to information, and the delay in answering information requests. Fundamental to each of these problems is the lack of internal bureaucratic incentives to obey the Act, exemplified by the agencies' failure to organize the processes by which data is indexed, stored and retrieved to speed data to the citizens who request it.

#### (1) JUDICIAL ENFORCEMENT

Only special interests have the financial resources to obtain judicial review of an information denial and to pay search fees and xeroxing charges if the request is granted. The only sanction for a public official who wrongfully withholds data is repudiation in the courts. The official knows that when he denies information to a special interest, the basis of that denial is likely to be tested. Often the mere threat of legal action makes information available which originally had been denied. The government's fear of being sued is understandable, because the courts, for the most part, have interpreted the Act liberally. Of 99 cases decided by the courts between 1967 and 1971, the government's refusal to release information was sustained in only 23 cases. The Center for Study of Responsive Law has won 13 of the 15 cases of information denial it has taken to the courts. Ronald Plessler, the Center's attorney for Freedom of Information Act cases, has a legal batting average which would humble Clarence Darrow. Litigation, however, is a luxury few citizens can afford. It is therefore critical that successful plaintiffs in a Freedom of Information Act case, at the court's discretion, be allowed to recover reasonable attorneys fees and other litigation costs. Even the simplest freedom of information case will cost in excess of \$1,000, a sum which practically guarantees that few cases will be brought by private citizens. The government now loses the great majority of these cases decided by the courts. If the courts had discretion to charge the government for the costs of deserving plaintiffs, the government might be more likely to take only its strongest cases to court. Such costs should be assessed against the specific agency which denied the information.

#### (2) DELAY

The average time for initial action on an information request is 30 days, and an appeal 55 days. Similar delays occur when a denial is taken to court. A study by William Dobrovir, a Washington attorney, found that the Federal government takes an average of 67 days to file any responsive pleading in a case. For the press, a delay of three months before they know whether they will get the information or not defeats the purpose of requesting the information in the first place. It is no surprise therefore that of 150-200 cases which have been filed under the Act, only four have been brought by newspapers or individual reporters. These delays are equally discouraging to the citizens whose desire for information is not buttressed by an economic interest.

It is therefore essential that agencies be required to respond to information requests in a finite period of time. The House of Representatives will soon be considering amendments to the Freedom of Information Act which would limit the period in which an agency must make a final determination on an information request to 20 days. Other amendments would eliminate the delay of the now obligatory internal agency appeal to an initial denial. The adoption of some specific time limits is critical if the Freedom of Information Act is to be effective.

#### (3) THE COSTS OF ACCESS

An other problem area is the practice of charging citizens for the "search and copying fees" incurred by the government in making information avail-

able. These "user charges," as they are officially known, have been justified at various times by the government on the grounds of economy and as a means of discouraging "frivolous requests." While both these grounds may seem reasonable on the surface, the Act provides no guidelines for the application of user costs by the agencies. As early as 1968, one year after passage of the Act, the House Committee on Government Operations found that agencies were abusing their discretion over fees, abrogating "to themselves more power in the handling of public information than the law intended." In leaving this minor housekeeping function to the discretion of the agencies, Congress surely did not intend for them to create toll gates on the citizen's access to information.

The Administrative Conference found that copying charges range from 5 cents a page at the Department of Agriculture to as high as \$1 a page at the Selective Service System. A charge of 25 cents a page is common. Clerical research charges vary widely, from a low of \$3 per hour at the Veterans' Administration to as much as \$7 an hour at the Renegotiation Board. The Department of Agriculture requested prepayment of \$85,000 in one instance and \$91,840 in another for access to documents in its pesticide division.

On May 2, 1972 George Schultz, the director of the Office of Management and Budget, finally tried to curb this abuse of search and copying fees by sending a directive that fees "should not be established at an excessive level for the purpose of deterring requests for copies of records." But in January 1973, OMB, with its tail between its legs, told the House Government Operations Committee that it would not enforce the earlier directive and was permitting agencies to charge what they wished.

Not only do these charges vary widely from agency to agency, they are also often applied in a discriminatory fashion. We have received frequent complaints from citizens who have been charged search fees and xeroxing costs for information which an agency made freely available to its regulatory clients. These "user" charges must be made uniform, low in cost, and subject to waiver for deserving citizens.

#### (4) PUBLIC ACCESS TO INTERNAL MEMORANDA

Temporal limits should also be used to open up internal agency decisionmaking to public review. Despite the disclosure bias of the Freedom of Information Act as a whole, Congress made a major exception for the internal memoranda generated by government decisionmaking. Exemption five of the Act states that its disclosure requirements do not apply to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." (5 U.S.C. § 552(b) (1970)) The purpose of the exemption was two-fold. Agency witnesses convinced Congress that a free and frank exchange of ideas necessary to effective decision-making would be inhibited if agency personnel were forced to operate in a fishbowl. Disclosure of internal memos, it was argued, would make staff members cautious and timid, fearing that they might be made a scapegoat for an unpopular decision. The District of Columbia Court of Appeals expressed this view in *Ackerly v. Ley* :

In the Federal Establishment, as in General Motors or any other hierarchical giant, there are enough incentives as it is for playing it safe and listing with the wind; Congress clearly did not propose to add to them the threat of cross-examination in a public tribunal. (420 F.2d 1336, 1341 (D.C. Cir. 1969))

The second purpose of the exemption was to prevent premature disclosure of agency decisions. According to the Attorney General's Memorandum on the Freedom of Information Act, Congress never intended to require the release of internal memos the premature disclosure of which would compromise agency objectives.

There is, nevertheless, a strong public policy interest in the making bases of government decisions available for public review. While it might be argued that the "statement of reasons" accompanying agency decisions and the right of judicial review give protection against arbitrary decisionmaking even when internal memos are not disclosed, these protections even if they were adequate do not operate for the inaction decisions, the decisions to do nothing or do nothing now, which are the most common kind of law made by agencies. When an agency decides not to investigate or not to prosecute, it rarely justifies its action in any public manner. Indeed, the public rarely learns that any action



was even considered. Even if agencies could be persuaded to issue opinions on no-action decisions, public review of bureaucratic discretion would still be incomplete. As Kenneth Culp Davis has pointed out, discretion is exercised not merely in final dispositions of cases but in each interim step. These interim decisions are far more numerous and sometimes just as important as final ones. "Discretion is not limited to substantive choices but extends to procedures, methods, forms, timing, degrees of emphasis, and many other subsidiary factors."

Perhaps because the public checks on bureaucratic discretion are so limited, the courts have been reluctant to grant a blanket exemption for internal memoranda. In *Consumers Union v. Veterans Administration* (301 F. Supp. 796 (S.D.N.Y. 1969) *appeal dismissed*, 436 F.2d 1363 (2d Cir. 1971)), the courts made a distinction between internal memoranda conveying factual material, which it said should be made public, and those conveying policy opinion, which it said should remain exempt. In *Bristol-Myers v. FTC* (424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)), the court refined the exemption further, holding that only the opinion portions of internal documents could be withheld from the public. This decision left the agencies with the administratively messy task of gleaning the factual sections from otherwise exempt policy papers.

No one is very happy with this state of affairs. Separating fact from opinion in individual memoranda is hardly a task for clerks. It requires the attention of policy personnel, taking them away from more substantive duties. As a result requests for internal papers are probably subject to more delay than requests for any other items under the Freedom of Information Act. Citizens feel that too few internal papers are made available while bureaucrats feel that if any more were made available, their decisionmaking apparatus would grind to a halt.

What is to be done? Several remedies have been proposed, from established a blanket exemption for all internal memos to abolishing the fifth exemption altogether. The case for making all internal papers public has some attractive features. Ralph Nader has argued that staffs are less likely to recommend "insupportable or otherwise politically inspired or campaign fund inspired statements if they know they have to be justified in the open sunlight." Charles Koch, writing in the *Maryland Law Review*, concludes that the necessity for protection of internal memoranda is overstated. "The decisionmaking process as a whole may benefit from criticism of the internal work product or the decisional process which resulted in an official decision." Staffs are more likely to do a more careful, unbiased job if they realize that their work product is going on to the public record. Perhaps the prospect of disclosure will stiffen their backbone in resisting the pressure of special interests who, without disclosure, will be the only ones to know of their role in decisions to act or not to act.

Opposed to this view, as noted above, are the "fishbowl" and "premature disclosure" arguments. Release of internal memos on pending decisions might hamper an agency's enforcement procedures and allow special interests to home in on individual staff members whose policy views they dislike. If all staff memos were released, there would also probably be an immediate depreciation of their value. The written memos would begin to resemble press releases while sensitive policy advice would be delivered orally.

A middle ground is to establish a statute of limitations, say two years, after which internal memos would be made public. The courts would still have authority to protect certain classes of information, e.g., where release would affect national security, law enforcement and personal privacy, but the perpetual protection of documents merely because they are internal would no longer be allowed. The present case law allowing release of factual internal documents would continue to give citizens limited access to internal memos during the two-year period.

##### (5) COUNTERING THE INSTINCT FOR SECRECY IN THE AGENCIES

The failures of the Freedom of Information Act often have less to do with the way the law was drafted than with agency non-compliance. Unless there is a change in the attitude with which the bureaucracy respond to requests for information, the promise of the Freedom of Information Act will never be realized.

In the 1966 hearings on proposed Freedom of Information Act, spokesmen for Federal agencies and departments were overwhelmingly opposed to its

major provisions. This view persists today. As the hearings by the House Committee on Government Operations clearly point out, the Federal bureaucracy's original hostility has tainted its implementation of the Act. In a few agencies, a change in attitude is now evident. The Federal Trade Commission has come a long way since that day in the summer of 1968 when it refused our staff access to its organization chart on the grounds that it was an internal memorandum and therefore exempt under the Act. The information policy of the Environmental Protection Agency is a great advance over the policy of the agencies it inherited. The same may be said to a lesser extent of the Food and Drug Administration.

Despite these bright spots, most observers of government information policy feel that the public access to information continues to be burdened by a bureaucratic intransigence which changes in administrative procedures or even amendments to the act alone will not solve.

While everyone complains about agency sabotage of the act, there has been little attempt to understand the incentives for secrecy which exist in the culture of bureaucracy. The bureaucracy's secrecy bias is not the result of a conspiracy between the permanent government and special interests. It reflects a basic reality of the organizational process: disclosure of information to the public threatens standard operating procedures and priorities of the agency and, often, the careers of the disclosers. This fear of public disclosure afflicts both political appointees at the top management level who fear they will be embarrassed or "second-guessed" if hither-to confidential information is made public and middle and lower echelon staff in the permanent government who fear for their job security and advancement if information they release leads to such embarrassment.

#### (6) PENALTIES FOR DISCLOSURE

One major reason the bureaucratic attitude "when in doubt, withhold" is so entrenched is that it is rooted in legal self-protection. An official is held individually accountable under criminal statutes for releasing trade secrets or other confidential commercial information but faces no sanction at all if he illegally withholds information from the public. The Federal Food, Drug and Cosmetic Act and the Federal Insecticide, Fungicide, and Rodenticide Act, for example, contain specific confidentiality requirements, which along with the general Federal confidentiality statute, 18 U.S.C. § 1905, make a public official criminally liable if he releases commercially valuable information. Senator McClellan (D-Ark.) has recently proposed a new criminal code (S.1 section 2-6F1) which extends even further the scope of disclosure for which a public servant can be sent to jail. Under McClellan's law, a Federal employee is criminally liable if "in violation of his obligation as a public servant under a statute or rule, regulation or order under such statute, he knowingly discloses any information which he has acquired as a public servant. \* \* \*"

On the other hand, the public official who illegally refuses to release information is subject to no civil or criminal penalty. A recent case in the Office of Economic Opportunity illustrates this double standard. OEO suspended one of its employees, Rudy Frank, for allegedly releasing confidential information on the salaries of teachers at a day care center operated by a private corporation under contract to OEO. Frank then sued OEO under the Freedom of Information Act to force OEO to make the day care salaries public. Faced with the lawsuit, OEO gave the "secret" data to Frank but refused to lift his suspension.

OEO's action has an unmistakable Kafkaesque flavor. The agency punished an employee for releasing "secret" information which it conceded is "public" when challenged by a lawsuit. Ronald Plessner, Mr. Frank's attorney, argues that instead of punishing Frank for disclosing what turned out to be public information, OEO should suspend or terminate those officials who suppressed the documents in the first place. The natural tendency of a Federal official faced with administrative or criminal sanctions if he incorrectly releases data is to keep requested records secret, if there is any doubt in his mind that the documents are public.

#### (7) THE TERRITORIAL IMPERATIVE

In trying to understand the psychology of secrecy in the government bureaucracy, we should not overlook the territorial imperative of bureaucrats, the instinctive reaction, as one Civil Service Commission lawyer has described

it, that "they own their desks and they own their file cabinets and that they own the papers that are in them." There is nothing uniquely Federal about this attitude. In virtually no other institution except the Federal government are employees expected to open their files to outsiders. Such obligations to the public obviously do not exist in private business but nor do they operate generally in state and local government or the Congress. It is little wonder then that many Federal officials have to be "reprogrammed" if they are to observe the spirit as well as the letter of the Freedom of Information Act.

#### (8) INCENTIVES FOR OPENNESS

Granted that freedom of information often conflicts with these self-protective attitudes, how can we create incentives for openness in the bureaucracy which will counter its secrecy bias? One proposal is to create incentives for implementation of the Act through the budgetary process. At the present time, a major cause for delay in meeting information requests is the fact that information retrieval is "added on" to the workload of officials assigned to operational duties. A great many information requests have policy implications which cannot be resolved by lower echelon. With a request for investigative files, for example, the agency must sift the file for data which might result in premature disclosure of its case, often a sophisticated task requiring professional skills. In other words, resources for handling information requests must be subtracted from substantive agency missions. If agencies were given specific appropriations for public information work, implementation of the Act would become a more central agency concern.

These public information funds would encourage the agency to reorganize its information system with the goal of reducing the discretionary content of information retrieval. Now most agencies respond to information requests on an ad hoc basis, with little screening of information in advance of requests. Each agency should have a public information center where public and exempt information is indexed for public review. The index of withheld documents should include the reasons the agency considers them exempt under the Act. This system has many advantages. It shifts much of the initial search burden of information requests to the public. By forcing the agency to specify reasons for withholding documents, it creates incentives for release (the citizen could still sue if he felt the information should not be exempt). Most important of all, it forces the agency to make most of its policy decisions about release of sensitive documents in advance of a request, thus reducing delay.

#### (9) COMPUTERIZATION OF RECORDS: A SHIELD FOR SECRECY?

Automation of data storage and retrieval through computer systems can also reduce delay. The Federal government over the last decade has increasingly converted its files from "manually-manipulated, eye-readable records stored in drawers and filing cabinets to automated, machine readable forms stored within computer central processing units or on 'off-line' discs, tapes, and micro-forms."<sup>3</sup> Computerization of record keeping, however, is a two-edged sword which can cut either for or against public disclosure of government data, depending on who is swinging it. In the late 1960s and early 1970s, basic decisions about computer systems have been made, vital software programming which controls access to automated files has been created, and manual records have been destroyed without any effective oversight by Congress, the press, or public interest groups.

At a recent conference on governmental secrecy sponsored by the Committee for Public Justice, Prof. Alan Westin of Columbia University warned that technological illiteracy of lawyers, legislators, writers, and others concerned with expanding public access to information has permitted organizations to computerize data with little concern for its implications for public access. Westin points out that computerization has created a new technological priesthood within government, whose knowledge of computer hardware and software capabilities give them an intimidating power to dismiss requests for computerized data as either non-feasible (no programs exist to retrieve such information), or too time-consuming and therefore too costly.

<sup>3</sup> Alan F. Westin, "Secrecy in a Technological Era," unpublished paper presented to Conference on Governmental Secrecy, Committee for Public Justice, May, 1973.



It is critical that Congress address the public access issues of computerization before its too late. It is very costly and disruptive to make major changes in computer systems once they have been designed in a particular way. These systems are now designed to serve the managerial needs of agency administrators, not the disclosure needs of the public. Even when a citizen finds computerized data programmed to meet his request, there are serious problems of cost. According to James Kronfeld, special counsel to the House Government Operations Subcommittee, it is a common practice for agencies to charge for the time required to locate information on computer tape, plus \$5.00 per page for the print-out of the data.

The application of computer technology to government record keeping is both an inevitable and welcome development. Properly designed, it can reduce the cost and time required to meet public requests for information. Improperly designed with only narrow concepts of bureaucratic efficiency or secrecy in mind, it can render futile the efforts of this committee to strengthen the Freedom of Information Act.

I therefore urge this Committee to investigate the degree to which executive agencies have considered problems of public access to information when they have automated their records. Agencies should be required to give public notice when they plan to introduce a new computer system, and to provide Congress and the public with an impact statement on the system's Freedom of Information Act implications. Public advisory committees should be established in each agency to give guidance on ways in which the computer system can be designed to advance the goals of public access.

Senator KENNEDY. Mr. Ackerly.

#### STATEMENT OF MR. ROBERT ACKERLY, ATTORNEY AT LAW

Mr. ACKERLY. Good morning, Mr. Chairman.

I think some of the problems that we have with the Freedom of Information Act can best be illustrated by reference to the Defense Contract Audit Manual which Mr. Gilliat raised this morning. I have a suit pending against the Secretary of Defense for release of the audit manual. I lost in the District Court which was not surprising because the Government made the same argument there that they made to you. But the day before yesterday we argued that case in the U.S. Court of Appeals for the District of Columbia.

While I won't reargue the case this morning, what we did develop for the court of appeals were a few facts that I think are significant.

First, the audit manual is available to at least 3,000 employees of the Defense Contract Audit Agency and a secret shared with 3,000 people is one that is probably not likely to remain confidential very long.

Second, we developed that the Audit Agency manual is made available to agencies of State and municipal governments. The Department of Defense, of course, has no sanction over an employee of a municipal government if he decides to make the manual available.

Third, we developed that the manual has been supplied to foreign governments but still not to the American public.

And then finally we supplied the court with a treatise on accounting which quotes liberally from the so-called secret portions of the audit manual. The Department of Justice counsel conceded to the court that all of the quotes in this handbook or treatise were accurate.

You asked Mr. Gilliat a question before about other agencies. The fact is that the NASA audit manual is available for purchase at the Government Printing Office, as are the manuals of the Atomic En-

ergy Commission, and two bureaus within the Department of Transportation.

I would never predict what a court will do but I have some confidence that the court is not going to simply affirm the District Court opinion in this case. But this is illustrative because the agency must feel that they have to keep resisting the disclosure of this manual. They mentioned it to you this morning. They are fighting it in court, and yet the fact is there are several thousand of them floating around the country and portions are being published by textbook writers.

A couple of points that I think are worthy of consideration in amending this act are these.

#### IN CAMERA INSPECTION

No. 1, the in camera process has some problems. The main problem is that you lose the adversary process. The Government comes in and submits documents to the court. The court must sit there and read them, try to make a judgment. The act does provide with respect to eliminating details which would be a clearly unwarranted invasion of personal privacy that the justification for the deletion shall be explained fully in writing.

Now, in each case that I filed I asked the court to require the agency, the Department of Justice, to file a memorandum explaining why the documents are exempt. In each case the Department says that the justification requirements of the act applies only to the clearly unwarranted invasion of privacy and no court yet has required the agency to file such a memorandum, but if they would be required to file a memorandum, I can then respond to that memorandum and the court would have the issues sharpened. You would have the adversary process even with an in camera inspection. Whether this would require an amendment or statement in the committee report I don't know.

Second, you suggested before that if the court found that there was substantial evidence to support the agency's position, the court could uphold it. But under present conditions there is no evidence before the court. All the agency does is bring in a package of documents and give them to a judge. The judges don't have time to read them. What the judges are doing now are appointing masters to read the documents and submit a report to the court.

I suppose that report will be confidential to the judge. But there is no evidence, there is no way that we can get any evidence except by talking about what we know the document should contain or might contain. Many of these documents are simply headed Memorandum Respecting Recommendations on Policy. The fact is I think the Congress sets the policy and the executive branch of the Government should carry out and implement that policy. The so-called policy recommendations under exemption 5 are really recommendations on how to implement the intent and will of Congress. They are not to develop, I think, a policy particularly with regulatory statutes and we are faced with that all the time. The argument is that if it is written by a lawyer, it is therefore within a lawyer-client privilege

and it shouldn't be disclosed, and secondly, it is always a recommendation on policy within the agency.

Finally, I think the important thing on attorneys' fees might be this. Not only would the person bringing the suit be reimbursed for his costs but the General Accounting Office, which is a great watchdog of the executive branch of the Government, if they discover that the executive branch is suddenly spending a lot of money on attorneys' fees for cases they are losing, they will promptly conduct an investigation of the implementation of this act and report it to Congress. I think really the watchdog effect of the GAO on the amount of money that the Government is required to pay in attorneys' fees for cases they lose might be the most important part, have the most salutary effect from authorizing the courts to award attorneys' fees and I would urge you to add that feature to the law.

The time elements, of course, are important. Sixty days for the Government to answer in litigation is in the Federal Rules of Civil Procedure and to modify that will require legislation. The Government does not need 60 days to answer one of these cases. The request has to be made to the agency and an appeal taken. The agency has their file on the case. They shift it to the Department of Justice and an answer can be filed promptly. In addition the Department habitually files a general denial. They don't even need to see the documents. They come in and admit jurisdiction and deny everything else. It is hard to get the case at issue. We do file motions for in-camera inspection but the Government objects to that because they want time to answer.

I think an amendment which would give the Government 20 days, which we all have in litigation is reasonable and would help expedite these considerations by the court.

Finally, I think there is just so much Congress can do in a law. The philosophy of the executive branch is the critical thing. There is not much you can do about that except the committee report I think can emphasize the intent of Congress that there be disclosure, that act be pointed toward disclosure and not toward secrecy. And I would think that the Defense Contract Audit Manual is a good illustration of an agency doggedly defending a document which is obviously available and floating around this country and in foreign governments and yet they remain committed to a position of resisting disclosure. I would hope that this committee report will emphasize once again that your intent is that in a close case the emphasis be on disclosure and not on secrecy.

I thank you very much for this opportunity to present my views to the committee.

#### INTERNAL MEMORANDA

Senator KENNEDY. Very good; very helpful suggestions and very useful.

Your view on eliminating completely the exemption for internal memoranda, would you give me that?

Mr. ACKERLY. Yes, sir, I know no justification for trying to withhold internal memoranda. The agencies have never really come up with a good explanation. I can't believe that a man would write any



less candid opinion because he thinks the public is going to see it. One argument I have heard is that scientists outside the Government will have an opportunity to evaluate comments that scientists within the Government are making. I think this is useful. I was denied access to a document last week in the 10th circuit, a recommendation of Dr. DuBridge to the President. The court said it was a recommendation on policy and there was a claim of executive privilege and since it was made to the President, it would not be disclosed.

I think I know what is in the document. Dr. DuBridge recommended that the helium conservation program be continued.

Now, why shouldn't that be made public? I really think there is no good, honest basis for that and I think if you reverse that, there would be a flurry of activity for about a week, then everything would settle down immediately. Everybody would be getting the same advice, and the public would get to know, particularly in areas other than military secrets and diplomatic secrets, we would get to know the basis for a lot of these decisions and I think it would be Government as usual very shortly. I don't think it would have an adverse impact on the administrative branch.

Senator KENNEDY. How would you feel about premature disclosure?

Mr. ACKERLY. Well, I think the agencies should have to justify the timing of the disclosure in each case. Even in criminal cases now and civil cases in court the emphasis is on disclosure. We get pre-trial discovery and I can see no basis for a 2-year time limit. We write opinions—we write legal opinions for a trade association and they are published through several hundred companies throughout the country. Our opinions to the trade association are no less candid than they are to a private client. We have found that is not a burden.

Senator KENNEDY. I am going to have to leave to vote. I will ask counsel to ask a final few questions I would like to get on the record. I will be back to hear the final two witnesses. If you could respond to Mr. Susman's questions I will be back.

Mr. ACKERLY. All right.

Mr. SUSMAN. Mr. Ackery, the provision is made in S. 1142 for awarding attorneys' fees. Some discussion on the record this morning indicated that there should be a distinction between public-interest type litigants or press litigants on the one hand, and those representing private corporations seeking documents of other private corporations, on the other. Since some of your experience is in the latter area, how would you feel about a limitation or guideline that effectively precludes attorney's fees from being awarded in many of the cases in which you have been involved?

Mr. ACKERLY. I don't think you should do that, not that we are not getting paid, but the impact here I think is not going to be necessarily on compensation. I think the impact is going to be on better compliance with the law. There will be more people more concerned with compliance with the law.

If you would like to put something in the legislative history which indicates that in exercising his discretion the judge should consider all the circumstances, for example, whether it is a private

individual or a public interest organization, I suppose that might have some impact. In the helium case I brought the case in the name of the National Helium Corp. I could have just as easily brought the case in the name of the Friends of the Earth for the Conservation of Helium. So I don't think any distinction is really valid and I think the long range value will be the concern of OMB, the concern of GAO and others, that money are being spent for attorney's fees on cases that are continually being lost. You will get better compliance, better voluntary compliance with the law rather than creating a bonanza for lawyers or hurting the Government.

#### TIME LIMITATIONS

Mr. SUSMAN. The Justice Department regulations which were recently published set out the same kind of time limits as the bill does on requiring agencies to respond to requests for information, but the regulations include specific waivers of that time limit for certain enumerated reasons, which include where records are stored elsewhere, where collection would be difficult within a time limit, where records have not been located by routine search, or where other agencies are involved.

Do you believe that, first, these are reasonable exceptions to the short time limit? Second, if they are, whether Congress should itself insititute them as a matter of law for all agencies? And third, whenever Congress puts a specific limit on and then an escape clause, to what extent do agencies generally stampede through that escape clause regardless of whether it appears to us presently to be reasonable.

Mr. ACKERLY. Well, I think taking your last observation first, the court of appeals here has already observed that the courts must be careful to guard against the agency's expansive interpretation of any exemption in the law and I think this is a natural response. There will be cases where agency records are located in other cities but I have no objection—for example, if DOD tells me the records are in Joliet, I will go out there and look at them. They don't have to bring file cabinets to Washington.

Second, Mr. Wellford pointed out some of the fees involved. One he didn't mention is the going rate of \$75 to \$80 an hour for computer time. If we are going to pay \$75 to \$80 for computer time, the agency should use it and locate those records. It would be a very rare case where an agency could not in a very short period of time tell you that their records are located in three cities and it would save us considerable expense and time to bring them to Washington. If you want to see them they are available in St. Louis, Joiliet, or wherever.

I think that would be a better answer than saying we need an extended period of time to locate them, an extended period of time to bring them back. With computers—and we do pay for the computer time on these requests—they should be able to locate their documents. Otherwise they should get a new program for the system, I would think. But I think it will be an extremely rare case that an agency could not locate these records in a very short period of time.

Mr. SUSMAN. I take it you ultimately think that the requester is

not going to be unreasonable when the agency has a legitimate excuse for not being able to produce documents, and over a period of time there will be very few people requesting information who will run into court if the agency says, "Look, we just haven't found the things yet."

Mr. ACKERLY. That rarely happens. We have made that implied threat to the agencies saying, look, it has been a month or 6 weeks and if we don't get a positive response we will treat it as a denial. But if you are really interested in getting the information and if you believe that the agency tells you they are trying to locate it, you will work with the agency to try to get the information.

I don't think these suits have been brought for the fun of bringing law suits or for practice. I think most people are sincere in their requests. And we want to get the documents and not litigation.

So I think, I don't know what the agency's experience is but my experience is that we work with the agencies and I have not yet brought a suit without a final denial although I may have one with EPA now because I am losing patience with them.

#### EQUITABLE DISCRETION

Mr. SUSMAN. Let me bring out one area that hasn't been mentioned often. Courts have indicated that they retain equitable jurisdiction not to order disclosure of information, even if they conclude that that information is not exempted from disclosure under the act. There are a couple of cases where the courts have said that the language of the act seems to require disclosure, but we have examined surrounding circumstances and the information and we decline to order disclosure. Do you think that this is a judicial rule that Congress ought to leave alone or do you think that we ought to remove that kind of equitable jurisdiction in the courts? Second, if we leave the courts with that discretion, maybe we ought to specifically grant them discretion to order release even if the act seems to suggest the documents are exempt—so that the courts could say the purpose of this exemption no longer applies, or there is no substantial reason for keeping these documents secret, and then order disclosure.

Mr. ACKERLY. First let me observe that I think the better reasoned opinions, and I think certainly the rule in the District of Columbia is that there are no exemptions other than those in the act. There are a couple of cases which hold pretty clearly that the court has no equitable jurisdiction beyond the exemptions in the act. I would urge you not to open that up. As you know, there are many, many district courts throughout the country and different judges have different philosophies but our record in the District Courts has not been nearly as good as it has been in the appellate courts and if you open the door for a judge—for example, on the audit manual Judge Hart said to give that manual to me would be giving away the Government's game plan. My answer to that is they have given it to everybody else, why won't they give it to me. It isn't that secret.

So I think the Congress should be precise. If the emphasis is on disclosure you can write the exemptions, you can write them clearly,



and you can explain them in legislative history, and that should be the limit of the court's authority.

The Government makes very, very strange arguments in some of these cases. You know, you will hinder the deliberative process; you will interfere with the man's ability to give an honest opinion to the Secretary of the agency. Usually the real guts of the reason for secrecy is "if I have to give this out it is going to hurt my position." That has been fairly standard. But they come up with a number of really facetious and specious arguments and then the Department of Justice lawyers tell us, well, hell, they are our clients, we have to represent them.

I think you would be opening the door for all kinds of arguments from the agency to the court, that while this is not specifically exempt, you should exercise your equitable jurisdiction to prevent disclosure. One of the illustrations I always use for a District Court Judge which gets the judge a little bit concerned is that if this memorandum is made available, Mr. Ackerly would have the same arguments to require you to release a memorandum from your law clerk to you on a particular case.

Well, of course, they are not comparable in any way but that is one of the illustrations. The judges react adversely and negatively to that as you would expect.

So I think if you open the door in this act for individual judgment of a judge, you are going to be expanding the exemptions far beyond what Congress had in mind.

#### INTERNAL MEMORANDA

Mr. SUSMAN. Finally, one of the House bills addresses the exemption relating to internal communications by distinguishing between those reflecting advice and opinion and those containing factual information, which tracks the language of some judicial pronouncements. Do you have any thoughts about this approach to that subject or this possible distinction in limiting the exemption?

Mr. ACKERLY. Well, I think it is fraught with hazard. The appellate courts have said, as you point out, that purely factual material should be made available even in a memorandum containing policy recommendations or advice, but I think the courts have gone much too far. I don't think they meant purely factual material. In private litigation or litigation with the agency, not every memorandum is exempt from disclosure. Even lawyers' memorandums are required to be disclosed by the courts occasionally. And it is not everything that is labeled recommendation.

For example, I have a case in the court of appeals now. The judge gave me everything except about five paragraphs and in his order he said I am not going to release these because paragraph No. 6 says "recommend," paragraph No. 7 says "recommendation." All they have to do is entitle any memorandum they want recommendation, or policy recommendation. The courts, if the courts are required to respect that, will sift through and see what is purely factual. Again this is going to be working contrary to the congressional intent.

I have also found that in recent rulemaking proceedings when memos are developed within the agency analyzing the rulemaking

records—they are now signed by the counsel to the administrator. Obviously, the counsel didn't do all of the memo because it contains an evaluation of scientific data, et cetera. Nevertheless, the minute the counsel signs it it is claimed to be within the lawyer-client privilege.

So I think what we should do is refine the basis for exempting—not every memorandum that contains a policy recommendation is exempt because again, with many of these regulatory statutes, the Congress sets the policy and the agency is implementing that policy.

Take helium conservation as a quick example. Dr. DuBridge recommended to the President apparently, although I haven't seen the documents, that the program be continued. The Government doesn't want me to have that because it would hurt their position. That wasn't a policy recommendation to the President. The Congress set the policy and said we should conserve helium unless certain things happen. Either they happened or they didn't. Dr. DuBridge found that they didn't happen. That is not a policy or recommendation or advice on policy.

So it is not every document that simply is headed policy or recommendations that should be exempt.

Mr. SUSMAN. Well, what would you advise the subcommittee in sorting through the various four or five different approaches to refining the internal communication exemption? S. 1142 does not adopt any of those approaches. It lets that exemption stand. But a number of suggestions in the hearings and a number of bills have recommended various approaches, all of which you have opposed or refuted during your testimony.

Mr. ACKERLY. Well, I think my observation is this. If you eliminate the exemption for agency memoranda, period, except for those under exemption 1—exemption 1 does have some good foundation and basis for it. But exemption 5—I think if exemption 5 was eliminated I really think you would have a big flurry and cries of anguish from the executive branch for about a week and over a short period of time they would adjust to the idea. As the Senator pointed out, the counsel of DOD is probably more counsel to the public than he is to the Secretary of Defense. I really don't think that it would hinder Government once Government got adjusted to the idea that their documents are going to be available to the public. Not military secrets, diplomatic negotiations, of the type conducted by Dr. Kissinger, of course, but exemption number 5 is really unnecessary and no matter how the agencies will complain, and they will, I think they can adjust to it.

Mr. SUSMAN. Thank you.

Senator KENNEDY. OK. I look forward to seeing the exchange. Our next witness is Mr. Dobrovir.

#### **STATEMENT OF MR. WILLIAM DOBROVIR, ATTORNEY AT LAW**

Mr. DOBROVIR. Thank you. I appreciate the invitation of the subcommittee to appear before it.

I testified about a year ago before the House subcommittee. At that time I pointed out that in my view as a litigator in this area, the problems in the administration of the act were not problems of

substance, which I felt that the courts were dealing with in an effective way in terms of interpreting the exemptions but, rather, problems of procedure and problems of the attitude of Government officials which I said at that time was uniformly hostile to the disclosure of information under the act.

Very little has changed; except that I have now come to the view that not only is the attitude of substantive agencies which is at fault, but perhaps even more the curious attitude of the Department of Justice. I suppose we have learned enough about the Department of Justice in the last year or so to begin to understand that the Department of Justice has become in effect the praetorian guard of the administration in effecting policies of secrecy and other policies of that sort.

I have litigated some seven Freedom of Information Act cases and I have won six and one is pending and the amount of lawyers' time devoted to the cases—if they had been paid at the regular rates of my old firm of Covington and Burling—would probably be up in the neighborhood of \$60,000 or \$70,000.

None of the cases has been appealed. We won all in the district court. This demonstrates I think that even the Department of Justice felt that there was no point in taking them up. But the amount of effort that has gone into litigating the cases, the amount of time of attorneys and of the client groups involved has been extraordinary and I think unfair.

Therefor I wholeheartedly support the notion that a court should assess attorneys' fees against the Government when the private party prevails.

I am almost ready to suggest that the word "May" assess attorneys' fees should be changed to "shall" assess attorneys' fees but I would leave that up to the good discretion of the subcommittee.

Let me give just a few examples of the kind of things that the agencies have done.

In a case which Mr. Wellford referred to, in which I was his counsel, in which the Department of Agriculture sent in a bill for \$85,000 because because they wouldn't let us see the indexes, we had to go to court and the court said, well, for heaven's sake, you have to let them see the indexes. So we went and did see the indexes.

In a case against the Veterans Administration, we presented an antiwar veterans group, who simply asked for the same lists of discharged veterans to solicit for membership that the Vets Administration was already giving to the American Legion and to the Veterans of Foreign Wars. The Government quite flatly did not tell the truth in terms of saying what kind of lists they were and who was getting them. We had to take a couple of depositions, which are quite expensive, before we found out that in fact the Government had not told the court the truth in its papers.

Another case was against the Department of Labor. We were seeking inspectors' reports of plants in which Federal contracts were being performed. The Government said it would destroy the program if these reports were made public. They argued that the manufacturers would not let Government inspectors into the plant, despite the fact the Government had several sanctions. It could simply



order the plant inspected or it could cut off the Government contract.

The court finally ordered in camera inspection of the documents, said there was nothing in there that seemed to the court to require secrecy and ordered them disclosed. As I understand it, the inspection program has gone forward without any particular hindrance.

Most recently I have seen an interesting contrast in the way in which cases are handled. One is a law suit that we just won the day before yesterday against the Internal Revenue Service in which the district court ordered the Internal Revenue Service to make public all private rulings. The Department of Justice defended the case despite the fact that a precedent had come down out of the 6th Circuit which made it very clear that the Government had absolutely no legal basis to defend the case. The Government had relied upon the House report which had added a gloss to the statute which was not in the statute. The *Hawkes* case in the Sixth Circuit said that whenever the House report conflicts with the statute it shall not be followed; the case was directly in point.

I wrote a letter to the Justice Department and said this case has come down, I think you ought to quit. They declined, claimed that private rulings were not ever used as precedent, and that, therefore, under the language of the House report they did not have to disclose them.

We had to take 11 depositions at a cost of well over \$1,000 just in transcripts alone in order to establish that in fact, as in any logically organized body which makes decisions, of course, the decision that is made by A on January 1 if it is logical and sensible will be followed by B on February 1. This is the meaning of precedents that we find in the judicial system itself.

On the other hand, when we sued the Treasury Department for disclosure of Treasury bill reports and reports to the Congress, and accordance to committees of the Congress on tax matters, particularly with the taxwriting committees, the Senate Finance Committee and the Joint Committee on Internal Taxation and the Ways and Means Committee. The Treasury lawyer who was assigned the case decided that the only way he could handle it would be to keep the Justice Department out of it altogether. He and I sat down and in effect negotiated an arrangement whereby the Treasury Department has decided to make all of this material publicly available, to make an index publicly available which anyone can go and look at in the kind of library setting that Mr. Wellford suggested. The Justice Department's attitude was very curious. When we were in the process of negotiations, the time for the Justice Department to file an answer had run out. Since the negotiations at that time seemed quite serious and near fruition, we were perfectly willing to give the Government more time but we wanted the stipulation to recite the fact that settlement negotiations were in the process. The Department of Justice refused to recognize that a settlement negotiation was in any way being discussed, said that they would have nothing to do with it, and refused to sign such a stipulation.

So I said, well, in that case you had better file a motion to extend your time and when I file my response I will say the only rea-

son I am not opposing it is that settlement negotiations are in progress, which is exactly what happened.

#### IN CAMERA PROCEDURES

Let me pass on, then, to two major points I want to make. One, is a point with respect to in camera procedures. In another case in which we have sued the Internal Revenue Service to make them disclose the internal memoranda behind a ruling in 1972 which permitted political contributions to be made in \$3,000 chunks to 1,000 committees without paying any gift tax, the Government responded that there were no documents. They said, we have received no communications from outside the Government and the IRS never received any communication from the Treasury Department. I did not believe this and which the district judge did not believe it, and he told the Government that if Mr. Schultz stood up on the witness stand and so testified, that he would not believe Mr. Shultz.

So the Government said, all right, we will show you all our records. Under an agreement whereby I would not make any public disclosure of the documents which I wanted until the court ruled that they should be publicly disclosed, I was given free access to the records of the Department of the Treasury and the Internal Revenue Service.

This is the only kind of in camera procedure which I think makes any sense. It permits the adversary process to work. It means that the three parties involved, the Government, the judge and the lawyer for the plaintiff, will see the Government and the judge seeing the documents, in which case the adversary process cannot work at all.

#### ITT DOCUMENTS

One final incident which I think is very important. We filed on behalf of the Project for Corporate Responsibility—and I would like the record to show that Mr. Joseph Gebhardt, special counsel of the project is with me today—we filed a request with the Justice Department for the 34 cartons of ITT records which the SEC had shipped over to the Justice Department back in October 1972.

Senator KENNEDY. Good luck.

Mr. DOBROVIR. The Justice Department responded and said, oh, well, we are presently conducting an active investigation.

Senator KENNEDY. I have heard it before.

Mr. DOBROVIR. I know you have. It was said to your committee, to the Judiciary Committee back in April 1972.

Enough has come out so that at least Congressman Staggers on the public record of his committee has said I don't believe it.

It seems to me that the only reason these documents were sent over to the Department of Justice was to keep them out of our hands because they might be embarrassing. Certainly some of those documents which have become public have proved too be very embarrassing; as they reflect letters from ITT officials to the Vice President saying Dear Ted, we are going to go and talk to John, meaning the Attorney General, Mr. Mitchell, who is presently under indict-

ment, about getting our antitrust case fixed; or words to that effect.

But we filed our request under the Department's new rules. They did reply within 10 days and denied the request. We then appealed under the new rules and 20 days later instead of giving us an answer, they came back and said we need another 20 days. So they took another 20 days and yesterday, was the last day. Yesterday I was told on the telephone that they had written me a letter saying that they had decided that they actually weren't going to answer my request. They simply said this matter has been referred to the Special Prosecutor, Mr. Cox, and why don't you go ask him for the records.

So today we are filing a law suit against the agency, which is the Department of Justice. I didn't think it would be appropriate for us to sue Mr. Cox; he has enough to do.

It seems to us that the agency has an obligation to make up its mind whether or not there is an investigation. At least as far as our information is concerned, it is there has been no investigation in process for approximately 1 year and that is where the matter stands today.

[The complaint in the case referred to follows:]

In the United States District Court  
for the District of Columbia  
Civil Action No.—

PROJECT ON CORPORATE RESPONSIBILITY 1525—18TH STREET, N.W.,  
WASHINGTON, D.C. 20036, PLAINTIFF

v.

SECURITIES AND EXCHANGE COMMISSION, 500 NORTH CAPITAL STREET,  
WASHINGTON, D.C. 20549

ELLIOT L. RICHARDSON, ATTORNEY GENERAL OF THE UNITED STATES,  
DEPARTMENT OF JUSTICE, WASHINGTON, D.C. 20530

and

DEPARTMENT OF JUSTICE, WASHINGTON, D.C. 20530, DEFENDANTS

*Complaint Requesting an Injunction Against Unlawful Withholding of  
Records and an Order for Production of Such Records*

1. This is an action under the Freedom of Information Act, 5 U.S.C. §552, to enjoin defendants from withholding identified records and to order defendants to make the records immediately available to plaintiffs to inspect and copy them.

#### JURISDICTION

2. This Court has jurisdiction of this action under 5 U.S.C. §552(a) (3).

3. The agency records sought to be produced in this action are located within the District of Columbia at the office of defendant Department of Justice (DOJ).

#### PARTIES

4. Plaintiff Project on Corporate Responsibility is a corporation and is a "person" within the meaning of 5 U.S.C. §552.

5. Defendants are agencies within the meaning of 5 U.S.C. §552. Defendant Securities and Exchange Commission (SEC) originally collected and compiled the documents that are the subject of this action. Defendant DOJ presently has custody of the documents which are the subject matter of this action.

#### FACTS

6. In 1971 and 1972 SEC collected from International Telephone and Telegraph Corporation (ITT) many documents which ultimately filled 34 cartons



or boxes. The documents related to various corporate activities of ITT, including mergers and acquisitions; communications with and references to communications with government agencies and high government officials, including former White House officials John Ehrlichman, Charles Colson, Peter Flanigan and Peter G. Peterson; former Attorney General John Mitchell; Attorney General Richard Kleindienst, and former Secretary of the Treasury Connally, respecting possible unlawful activities of ITT and the avoidance of law enforcement proceedings in connection with them; political activities, including political campaign contributions of ITT; sales of stock by ITT insiders; ITT activities in Chile; and other matters. These records (the ITT records) are the records sought to be disclosed in this action.

7. In April 1972 the Senate Judiciary Committee requested the Chairman of SEC to make the ITT records available to the Committee for the purpose of evaluating the qualifications of Richard Kleindienst to be Attorney General of the United States, by determining what role Mr. Kleindienst had played in DOJ's acceptance of a consent decree in the ITT-Hartford Fire Ins. Co. merger case. The chairman refused the request.

8. SEC's investigation of insider trading by ITT officers resulted in the filing of a civil action in the United States District Court for the Southern District of New York and the simultaneous entry of a consent decree in that action, in June 1972.

9. On September 21, 1972, the House of Representatives Special Subcommittee on Investigations of the Committee on Foreign and Interstate Commerce (the Staggers Committee) requested SEC to make the ITT records available to it. On September 26, 1972, the Chairman of SEC refused the request asserting that SEC was conducting an investigation of insider trading in shares of ITT. Committee, SEC agreed to reconsider. On September 28, 1972, the Staggers Committee renewed the request. On October 6, 1972, SEC informed the Staggers Committee that the ITT records had been transported to DOJ.

10. On October 17, 1972, the Staggers Committee requested DOJ to make the ITT records available. On October 26, 1972, DOJ refused the request, asserting that DOJ was investigating possible obstruction of justice by ITT officers.

11. The transportation of the ITT records from SEC to DOJ was carried out in order to avoid making the documents available to the Staggers Committee because the records contained material potentially embarrassing to and showing the possible wrongdoing of high officials of the executive branch of government.

12. The transportation of the records from SEC to DOJ was carried out at the suggestion or instruction to the Chairmen of SEC by John W. Dean III, then Counsel to the President, since dismissed.

13. On March 22, 1973, plaintiffs filed requests with SEC and DOJ under the Freedom of Information Act and defendants' pertinent regulations for access to inspect the 34 cartons of ITT records. On April 2, 1973, SEC denied the request. On April 6, 1973, the Deputy Attorney General of DOJ denied the request, asserting that an active investigation of possible obstruction of justice and perjury was under way. On April 11, 1973, plaintiff appealed the denial to the Attorney General under 28 CFR §16.7, which provides that such appeals shall be decided within 20 days. On May 10, 1973, the Department of Justice stated that it would decide the appeal on or before June 7, 1973. The Department failed to act on June 7, 1973, and the failure to reply to the appeal is a denial of the appeal. Plaintiff has exhausted its administrative remedies.

14. No active investigation of wrongdoing by ITT officers is being conducted by SEC or DOJ. Disclosure of nothing in the 34 cartons of ITT records could in any way jeopardize or otherwise impede any investigation of obstruction of justice or perjury asserted by DOJ to be under way.

15. Plaintiff's request for records and appeal complied with defendants' applicable regulations. Plaintiff has exhausted its administrative remedies.

#### CAUSE OF ACTION

16. The records requested are identifiable agency records; defendants are required by 5 U.S.C. §552(a)(3) to make the requested records promptly available to plaintiff; defendants have failed and refused to do so, and unless ordered to do so by this Court, defendants will continue to deny plaintiff access to the records requested, in violation of 5 U.S.C. §552(a)(3).

## PRAYER FOR RELIEF

WHEREFORE, plaintiff prays that this Court:

17. Issue a permanent injunction to the defendants, their agents and subordinates, enjoining them from further withholding from public disclosure the agency records which plaintiffs have requested.

18. Order the immediate production of the records for public inspection and copying;

19. Order defendants to reimburse plaintiff for the reasonable expenses incurred in bringing this proceeding;

20. Provide for expedition of proceedings on this complaint; and

21. Grant such other and further relief as may be appropriate.

WILLIAM A. DOBROVIR

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*Washington, D. C. 20036 (202) 239-1544.*

JOSEPH D. GERHARDT,

*1525-18th Street, N.W.*

*Washington, D. C. 20036 (202) 387-3218,*

*Attorneys for Plaintiff.*

JUNE 8, 1973.

That is just another example directly this time of the way the Department of Justice treats its obligations under the Freedom of Information Act.

Thank you.

Senator KENNEDY. Good statement. Very helpful.

[A list of FOI cases filed in the District of Columbia and the length of time taken by the Government to respond was compiled and submitted for the record by Mr. Dobrovir:]

Case	Date filed	Date	Number of days before responsive pleading filed	Date	Number of days before decided
			Number of days		Number of days
1.	July 14, 1967	Sept. 15, 1967	63	Jan. 14, 1972	1,630
2.	Nov. 13, 1967	Feb. 23, 1968	105	June 11, 1968	214
3.	Apr. 17, 1968	July 19, 1968	93	Nov. 25, 1968	222
4.	June 27, 1968	Aug. 26, 1968	60	Nov. 4, 1968	130
5.	Nov. 12, 1968	Feb. 24, 1969	104	Nov. 3, 1969	325
6.	May 7, 1969	July 8, 1969	62	June 11, 1970	400
7.	Dec. 15, 1969	Feb. 6, 1970	53	Jan. 22, 1971	372
8.	Dec. 12, 1969	Mar. 9, 1970	87	Sept. 17, 1970	332
9.	Jan. 12, 1970	Apr. 6, 1970	56	Oct. 26, 1970	259
10.	Nov. 10, 1970	Feb. 4, 1970	86	July 27, 1970	259
11.	Feb. 17, 1970	Apr. 20, 1970	61	(1)	701
12.	Mar. 12, 1970	May 7, 1970	56	Feb. 11, 1972	701
13.	Mar. 20, 1970	June 5, 1970	77	May 6, 1971	411
14.	Mar. 11, 1970	Mar. 31, 1970	20	May 11, 1970	61
15.	May 1, 1970	May 21, 1970	20	July 31, 1970	91
16.	Apr. 23, 1970	May 1, 1970	8	May 12, 1970	19
17.	May 25, 1970	July 24, 1970	60	Aug. 21, 1970	83
18.	June 29, 1970	Aug. 31, 1970	63	July 6, 1971	372
19.	July 9, 1970	Aug. 20, 1970	42	Apr. 21, 1971	285
20.	Aug. 3, 1970	Oct. 16, 1970	74	Nov. 16, 1970	105
21.	Aug. 12, 1970	Sept. 21, 1970	40	Sept. 25, 1970	44
22.	Aug. 26, 1970	Oct. 28, 1970	103	June 15, 1971	333
23.	Nov. 17, 1970	Jan. 22, 1971	66	(1)	226
24.	Dec. 15, 1970	Feb. 19, 1971	66	July 29, 1971	226
25.	Mar. 5, 1971	May 6, 1971	61	(1)	176
26.	Apr. 23, 1971	July 6, 1971	135	Aug. 16, 1971	176
27.	Apr. 27, 1971	June 29, 1971	63	Jan. 19, 1972	267
28.	June 22, 1971	Aug. 23, 1971	62	(1)	16
29.	June 30, 1971	Aug. 30, 1971	61	(1)	16
30.	Aug. 11, 1971	Aug. 23, 1971	12	Aug. 27, 1971	16
31.	Sept. 30, 1971	Feb. 14, 1972	137	(1)	16
32.	Oct. 8, 1971	(2)	-----	(1)	16
33.	Oct. 29, 1971	(2)	-----	(1)	16
Average number of days.			68	-----	294

<sup>1</sup> No decision yet.

<sup>2</sup> No responsive pleading yet.

## FREEDOM OF INFORMATION ACT

### CASES FILED IN THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

1. *Gilbert A. Cunéo and Herbert L. Fenster v. Robert S. McNamara and William B. Petty*, Civil Action No. 1826-67.
2. *Bristol-Myers Co. v. Federal Trade Commission*, 284 F. Supp. 745 (D. D.C. 1968).
3. *Robert L. Ackerly v. James L. Goodard*, Civil Action No. 923-68.
4. *Grumman Aircraft Engineering Corp. v. The Renegotiation Board*, Civil Action No. 1595-68.
5. *Pfister Chemical, Inc. v. The United States of America*, Civil Action No. 2804-68.
6. *Associazione Industrie Sederierziehc Italiano v. Department of Treasury*, Civil Action No. 1189-69.
7. *Isadora Weckler v. Wirtz, et al.*, Civil Action No. 3549-69.
8. *Lawrence B. Smith v. United States, et al.*, Civil Action No. 3523-69.
9. *Edvard Irons v. Schuyler*, Civil Action No. 75-70.
10. *Marilyn Fisher, et al. v. Renegotiation Board*, Civil Action No. 342-70.
11. *Laurent Alpert, et al. v. Farm Credit Administration*, Civil No. 466-70.
12. *Harrison Wellford v. Hardin, et al.* Civil Action No. 740-70.
13. *National Education Foundation, Inc. v. John N. Mitchell*, Civil Action No. 832-70.
14. *Harold Weisberg v. Department of Justice, et al.*, Civil Action 718-70.
15. *National Cable Television Association, Inc. v. FCC*, Civil Action No. 1331-70.
16. *Holly Corp. v. Renegotiation Board*, Civil Action No. 1239-70.
17. *Gary A. Soucie v. Lee A. Dubridge, et al.*, Civil Action No. 1571-70.
18. *Carolyn M. Morgan v. Food and Drug Administration, et al.*, Civil Action No. 1928-70.
19. *David B. Lilly Corp., et al. v. Renegotiation Board*, Civil Action No. 2055-70.
20. *Harold Weisberg v. Department of Justice*, Civil Action No. 2301-70.
21. *Astro Communications Laboratory v. Renegotiation Board*, Civil Action No. 2403-70.
22. *Harold Weisberg v. General Service Administration, et al.*, Civil Action No. 2549-70.
23. *Sterling Drug, Inc. v. Mitchell*, Civil Action No. 3391-70.
24. *Committee to Investigate Assassinations, Inc. v. U.S. Department of Justice*, Civil Action No. 3651-70.
25. *Missouri Portland Cement Co. v. FTC, et al.*, Civil Action No. 474-71.
26. *Herbert L. Fenster v. George Lowe*, Civil Action No. 822-71.
27. *Clark Hoyt v. General Services Administration, et al.*, Civil Action No. 845-71.
28. *American Manufacturing Co. of Texas v. the Renegotiation Board*, Civil Action No. 1246-71.
29. *Ash Grove Cement Co. v. Federal Trade Commission, et al.*, Civil Action No. 1298-71.
30. *Patsy T. Mink, et al. v. Environmental Protection Agency, et al.* Civil Action No.
31. *Reuben B. Robertson III, et al. v. Shaffer, et al.* Civil No. 1970-71
32. *James Lafferty, et al. v. Rogers, et al.*, Civil Action No. 2033-71
33. *Center for National Policy Review on Race and Urban Issues, et al. v. Richardson*, Civil Action No. 2177-71



Senator KENNEDY. Mr. Kass.

# STATEMENT OF BENNY KASS, ATTORNEY AT LAW

Mr. KASS. Thanks, Senator.

For the record my name is Benny Kass, practicing lawyer in Washington. As you know, Senator, I was former assistant counsel to this subcommittee and deeply involved in the entire legislative history involving the enactment of the Freedom of Information Act.

I think before I go on—I will be brief—I think there are several ironies as we are testifying here that ought to be put on the record. From my vast experience in involvement in government information ranging back to my experience as counsel to John Moss' subcommittee from 1962 to 1965, I am convinced that public are the only ones who can't get information. The rest of the world, everybody else has that information but the public who are, or should be, vitally concerned with this information.

Another irony, listening to the DOD, who now support the Freedom of Information Act as it is written, yet opposed any amendment from 1962 to 1965 when they were up before these same committees. They widely opposed it on the ground it would cause havoc to the government and basic foundations of our system.

A third irony is happening now that happened when we were involved in the original FOI bill. The FOIA, no question about it, is a badly written bill and one of the reasons it is a badly written bill, we received absolutely no cooperation from the administration at the time. Rather than cooperating and giving us the assistance that was needed to iron out some of the details that are cropping up periodically, they opposed it on the ground it was unconstitutional, that Congress didn't have the authority, et cetera, et cetera.

Ironically also the passage of the act on July 4, 1966, was not by design to be an historic occasion, but since Congress had adjourned for the summer or a period of time, July 5 would have been the day that the President could have pocket vetoed. A massive effort was made by the press associations and others to get the President to sign it because there was even at that late date a concern that the President wasn't going to sign the FOI bill.

I think this is the history which leads me to believe that although the FOI Act was supposed to be a positive effort to make more information available to the public, even today, and I regret to say it, the FOI is used as authority—and cited as justification—for withholding information rather than information being made available to the public. I agree with what Mr. Dobrovir and others have said time and time again, I don't know how you can change the philosophy of individuals but secrecy still is their way of life.

## BACKGROUND OF HOUSE REPORT

One thing I would like to get on the record because I think it is important—I at one time thought I would write a law review article but time and everything else doesn't permit it—there is always a question as to why the House report is so different from the rest of

the bill, leading Professor Davis to comment in one of his articles that under the FOI Act in this case where the legislative history is unclear you have to look to the statute itself. The basic reason that the House bill is different was after the Senate passed the Freedom of Information Act and it was about to be reported out of the House Government Operations Committee, the Justice Department—Mr. Katzenbach, Mr. Wozencraft—came up and talked to Congressman Moss and said, look, we cannot support the bill. There are a number of changes that have to be made.

I kind of appeared as an emissary on behalf of the former chairman of this subcommittee to Congressman Moss and I said it is our reading from the Senate that the Senate has already passed this bill twice, that there should be no amendments. We wanted to move forward with it. We have played with it long enough.

So basically what was done under really almost an implied veto—I don't think they ever specifically said they would veto it but there was an implied threat—we tried to compromise a number of the specific objections into the House report. I don't think time permits going into these details. I have a very brief analysis which I was going to submit. I have to type it and I will submit it for the record, pointing out where the House kind of gave in to what the Justice Department wanted.

[The material referred to follows:]

BOASBERG, HEWES, KLORES & KASS,  
Washington, D.C., August 8, 1973

Mr. TOM SUSMAN,  
Administrative Practice Subcommittee  
U.S. Senate  
Washington, D.C.

DEAR TOM: Presently, I am vacationing in Hyannis, Mass., and reminded myself to send the FOI material. In order to expedite matters, I have marked the eight basic changes from the Senate FOI bill on the attached excerpts from H. Rept. 1497.

I think this will meet your purposes. If there are any questions, I will be back in my office on the 15th.

Sincerely,

BENNY L. KASS.

#### CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION

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MAY 9, 1966.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. DAWSON, from the Committee on Government Operations,  
submitted the following

#### REPORT

[To accompany S. 1160]

The Committee on Government Operations, to whom was referred the bill (S. 1160) to amend section 3 of the Administrative Procedure Act, chapter 324, of the act of June 11, 1946 (60 Stat. 238), to clarify and protect the right of the public to information, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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## IV. DETAILED DESCRIPTION

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*Subsection (b).*—The present subsection (b) permits an agency's orders and opinions to be withheld from the public if the material is required for good cause found to be held confidential." Subsection (b) of S. 1160 deletes this general, undefined authority for secrecy. Instead, the bill lists in a later subsection the specific categories of information which may be exempted from disclosure.

In addition to the orders and opinions required to be made public by the present law, subsection (b) of S. 1160 would require agencies to make available statements of policy, interpretations, staff manuals, and instructions that affect any member of the public. This material is the end product of Federal administration. It has the force and effect of law in most cases, yet under the present statute these Federal agency decisions have been kept secret from the members of the public affected by the decisions.

As the Federal Government has extended its activities to solve the Nation's expanding problems—and particularly in the 20 years since the Administrative Procedure Act was established—the bureaucracy has developed its own form of case law. This law is embodied in thousands of orders, opinions, statements, and instructions issued by hundreds of agencies. This is the material which would be made available under subsection (b) of S. 1160. [1] However, under S. 1160 an agency may not be required to make available for public inspection and copying any advisory interpretation on a specific set of facts which is requested by and addressed to a particular person, provided that such interpretation is not cited or relied upon by any officer or employee of the agency as a precedent in the disposition of other cases [2] Furthermore, an agency may not be required to make available those portions of its staff manuals and instructions which set forth criteria or guidelines for the staff in auditing or inspection procedures [3] or in the selection or handling of cases, such as operational tactics, allowable tolerances, or criteria for defense, prosecution, or settlement of cases.

Subsection (b) solves the conflict between the requirement for public access to records of agency actions and the need to protect individual privacy. It permits an agency to delete personal identifications from its public records "to prevent a clearly unwarranted invasion of personal privacy." The public has a need to know, for example, the details of an agency opinion or statement of policy on an income tax matter, but [4] there is no need to identify the individuals involved in a tax matter if the identification has no bearing or effect on the general public. Subsection (b) of S. 1160 would prevent the privacy deletion from being used as a general excuse for secrecy by requiring that the justification for each deletion be explained in writing.

[5] Subsection (b) would help bring order out of the confusion of agency orders, opinions, policy statements, interpretations, manuals, and instructions by requiring each agency to maintain for public inspection an index of all the documents having precedential significance which would be made available or published under the law. The indexing requirement will prevent a citizen from losing a controversy with an agency because of some obscure or hidden order or opinion which the agency knows about but which has been unavailable to the citizen simply because he had no way to discover it. However, considerations of time and expense caused this indexing requirement to be made prospective in application only.

Many agencies—including the Interstate Commerce Commission which is the oldest Federal regulatory agency—already have adequate indexing programs in operation. As an incentive to establish an effective indexing system, subsection (b) of S. 1160 includes a provision that no agency action may be relied upon, used, or cited as a precedent against a private party unless it is indexed or unless the private party has adequate notice of the terms of the agency order.

Subsection (b) requires that Federal agency records which are available for public inspection also must be available for copying, since the right to inspect records is of little value without the right to copy them for future reference. Presumably the copying process would be without expense to the Government since the law (5 U.S.C. 140) already directs Federal agencies to charge a fee for any direct or indirect services such as providing reports and documents.

Subsection (b) also requires concurring and dissenting opinions to be made available for public inspection. The present law, requiring most final opinions and orders to be made public, implies that dissents and concurrences need not



be disclosed. As the result of a Government Information Subcommittee investigation a number of years ago, two major regulatory agencies agreed to make public the dissenting opinions of their members, but a recent survey indicated that five agencies—including the Federal Deposit Insurance Corporation and the Renegotiation Board—do not make public the minority views of their members.

*Subsection (c).*—In place of the negative approach of the present law (5 U.S.C. 1002) which permits only persons properly and directly concerned to have access to official records if the records are not held confidential for good cause found, subsection (c) of S. 1160 establishes the basic principle of a public records law by making the records available to any person.

The persons requesting records must provide a reasonable description enabling Government employees to locate the requested material, but the identification requirement must not be used as a method for withholding. Reasonable access rules can be adopted stating the time and place records shall be available—presumably during regular working hours in the location where the records are stored or used—and stating the records search or copying fees which may be charged pursuant to 5 U.S.C. 140.

Subsection (c) contains a specific remedy for any improper withholding agency records by granting the U.S. district courts jurisdiction to order the production of agency records improperly withheld. If a request for information is denied by an agency subordinate the person making the request is entitled to prompt review by the head of the agency. An aggrieved person is given the right to file an action in the district where he resides or has his principal place of business, or where the agency records are situated.

The proceedings are to be *de novo* so that the court can consider the propriety of the withholding instead of being restricted to judicial sanctioning of agency discretion. [6] The Court will have authority whenever it considers such action equitable and appropriate to enjoin the agency from withholding its records and to order the production of agency records improperly withheld. The burden of proof is placed upon the agency which is the only party able to justify the withholding. A private citizen cannot be asked to prove that an agency has withheld information improperly because he will not know the reasons for the agency action.

The court is authorized to expedite actions under subsection (c) "in every way," and the court review procedure would be expected to serve as an influence against the initial wrongful withholding instead of adding substantially to crowded court dockets.

*Subsection (d).*—The subsection requires that a record be kept of all final votes of multiheaded agencies in any regulatory or adjudicative proceeding and such record shall be open to public inspection. Practices of the many agencies vary in this regard. The subsection would require public access to the records of official votes unless the information is withheld pursuant to the exemptions spelled out in the following subsection.

*Subsection (e).*—All of the preceding subsections of S. 1160—requirements for publications of procedural matters and for disclosure of operating procedures, provisions for court review, and for public access to votes—are subject to the exemptions from disclosure specified in subsection (e). They are:

1. Matters specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy: The language both limits the present vague phrase, "in the public interest," and gives the area of necessary secrecy a more precise definition. The permission to withhold Government records "in the public interest" is undefinable. In fact, the Department of Justice left it up to each agency to determine what would be withheld under the blanket term "public interest."<sup>13</sup> No Government employee at any level believes that the "public interest" would be served by disclosure of his failures or wrongdoings, but citizens both in and out of Government can agree to restrictions on categories of information which the President has determined must be kept secret to protect the national defense or to advance foreign policy, such as matters classified pursuant to Executive Order 10501.

2. Matters related solely to the internal personnel rules and practices of any agency [7] Operating rules, guidelines, and manuals of procedure for Government investigators or examiners would be exempt from disclosure but this exempt

<sup>13</sup> Attorney General's Manual, p. 18.

would not cover all "matters of internal management" such as employee relations and working conditions and routine administrative procedures which are withheld under the present law.<sup>14</sup>

3. Matters which are specifically exempted from disclosure by other statutes: There are nearly 100 statutes or parts of statutes which restrict public access to specific Government records. These would not be modified by the public records provisions of S. 1160.

4. Trade secrets and commercial or financial information obtained from any person and privileged or confidential: This exemption would assure the confidentiality of information obtained by the Government through questionnaires or through material submitted and disclosures made in procedures such as the mediation of labor-management controversies.<sup>15</sup> It exempts such material if it would not customarily be made public by the person from whom it was obtained by the Government. The exemption would include business sales statistics, inventories, customer lists, scientific or manufacturing processes or developments, and negotiation positions or requirements in the case of labor-management mediations. It would include information customarily subject to the doctor-patient, lawyer-client, or lender-borrower privileges such as technical or financial data submitted by an applicant to a Government lending or loan guarantee agency. [8] It would also include information which is given to an agency in confidence, since a citizen must be able to confide in his Government. Moreover, where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations.

5. Inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency: Agency witnesses argued that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended, and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to "operate in a fishbowl." Moreover, a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation. This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy. S. 1160 exempts from disclosure material "which would not be available by law to a private party in litigation with the agency." Thus, any internal memorandums which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public.

\* \* \* \* \*

I don't think it was a sellout but in any event it was really the price of getting the bill. It was my legal advice to both the chairman of this committee and the chairman, Congressman Moss, that the legislative history only interprets and does not vitiate in any way the legislation and that the legislation was strong and was there.

I think this is important just for the record to point out why the House report is different. Fortunately, as Mr. Dobrovir said, there have been a number of cases all of which have said that the House report is so different that we have to look to the statute and that the House report should not in any way undermine the basic statute that was passed by Congress in 1966.

Just three points which I think are vital. I, too, have represented clients, Congressman Moss and Congressman Reid, seeking the Pentagon Papers before Judge Gessell. We lost that case. That was under the first exemption. I am representing Congressman Aspin right now as an individual seeking the Peers Commission report on

<sup>14</sup> Hearings, pp. 29 and 30.

<sup>15</sup> Hearings, pp. 45 and 46.

My Lai. We lost in the lower courts and the matter is on appeal right now.

I have been troubled since Judge Gessell asked: do you suggest, he said, that we put this, the Pentagon Papers, in camera, where there is no adversary process. I am troubled because I think there should be an adversary process but the suggestion Mr. Dobrovir has made merits, I think, strong consideration of this committee.

What harm is there if one more person is privy to these documents? We are officers of the court, namely, the lawyers for the plaintiff, to look at that in an adversary process in camera with the judge. We are officers of the court as Mr. Dobrovir pointed out. We can be trusted. If we can't be trusted, then there are procedures and penalties they can take if we leak these things. The leak usually doesn't come from our side. The leak usually comes from within the Government itself.

So I think if change is made in the first exemption, and I strongly urge it, that in camera proceedings are made, that at least the legislative history of this committee, if not indeed the statute, spell out that the attorney for the plaintiff has access to these records in an in camera proceeding so that the court can analyze—the adversary process is extremely important.

The question of fees. As a private lawyer who has incurred considerable expenses pro bono, time and everything else involved in these litigations, I strongly urge a provision providing for attorneys' fees. In my opinion not only in the freedom of information area but in every area involving the public and consumer, whether it is the homebuyer, whoever he may be, a provision for attorneys' fees for successful plaintiffs is probably the most important provision to enable access for every citizen to the courts.

Finally, I would oppose any appeal procedure to be spelled out in any bill. It seems too me that any citizen who has been denied access to information has an immediate right to go to court. One of the compromises, so to speak, put into the House report was to enable a kind of review proceeding to the court but it would be my strong urging that this committee reject any appeal proceeding. I think that would actually become a delaying tactic rather than expediting the matter.

Certainly the Government must be required to drop their reporting time or their answering time from 60 to 20 or 30 days. And I think that would be important. But I would strongly oppose any additional appeal proceeding on the grounds that it would really be a delay.

One further point. In S. 1142 on page 5 where you talk about investigatory records, it says "investigatory records compiled for any specific law enforcement purpose the disclosure of which is not in the public interest." I would strongly urge that the words "public interest" be stricken from any statute passed. It was our history after long experience that the words "public interest" in the old section 3 of the Administrative Procedures Act became the vehicle for withholding rather than for releasing information. It was in the public interest to withhold, so to speak, and this is the history cited



time and time to congressional committees and to courts. So I think there are some changes needed.

I concur with the other testimony but I would strongly oppose the inclusion of any words "public interest" in any particular statute.

I thank the committee for giving me this time.

Senator KENNEDY. Very good suggestions.

Given your remembrances of the wailing of various agencies about the cost and burden, the administrative machinery that would have to be set up, now looking back in retrospect, how real were those concerns?

Mr. KASS. Well, I don't think any of the wailings and the concerns of the administrative agencies have come forward. I remember Congressman Moss used to say the agency comes up on legislation and interprets bills very narrowly until they are passed and then they interpret them very broadly. Government hasn't been hurt by freedom of information. There may be other problems but not because of that. I don't think these concerns are very real.

Senator KENNEDY. What about the disclosure or nondisclosure of the identity of people, like informers whose public identification could subject them to harassment or danger? How do you feel about that?

Mr. KASS. I feel certainly the Government has a responsibility and has a right to protect informers who give Government information. The only problem that troubles me is it always comes out that again this becomes a vehicle for withholding. You don't have information. You don't have the access to it. And perhaps again the in-camera proceeding could apply where one additional party, the lawyer for the plaintiff, has an opportunity to cross-examine the informer or at least those who are making the affidavits. Too often what happens, Senator, when the Government sends an answer, they file a form affidavit in effect and as Mr. Dobrovir pointed out, they are lying in many instances and there is no opportunity to cross-examine because the judge looks at an affidavit and he says that is the extent of it. So I would strongly urge while there is reason to withhold the names of informers, that at least the parties who are concerned, if the judge believes that they are legitimate in seeking this information, have an opportunity in camera if necessary to cross-examine them.

Senator KENNEDY. What is your reaction to the different suggestions, one of which I made, about identifying the person who exercises the denial authority, or having one person within an agency who bears that responsibility?

Mr. KASS. I think——

Senator KENNEDY. Do you have any reaction?

Mr. KASS. Yes; I am troubled by singling out one individual because what will happen is that people are generally gun-shy anyway and I am terribly afraid of this. Often they may become the scapegoat for a particular Assistant Secretary who says, you withhold that information, you put your name on it. But I think there ought to be one central person responsible for putting his name on it and being called to justify and substantiate withholding.

Senator KENNEDY. Mr. Gilliat, since you are usually the guy whom the finger is pointed at, do you have any reaction to either alternative?

Mr. GILLIAT. I guess I don't quite understand your question. It seems to me the person making the decision is identified by his signature on the decision.

Senator KENNEDY. We would be interested in having the person who has the prime responsibility in that or even the lower staff responsibilities—where you would put that buck slip to have them accountable.

Mr. GILLIAT. I think it is appropriate to identify only the person with the responsibility. It has been my experience that those persons very carefully review the recommendations. One that I made just the other day I know has been circulated several times with the thought that we might be able to do better, because the official, the acting general counsel, was reluctant to put his name on this because he thought perhaps there was a more reasonable approach we could take. I think that is adequate.

Mr. KASS. One other point, Senator, without getting into debate. I would strongly oppose that statement. It is my experience that higher level officials will often rubberstamp the decision of the lower person.

Senator KENNEDY. Well, on that harmonious note we will recess until 10 a.m. Monday morning.

Thank you very much, gentlemen.

[Whereupon, at 12:45 p.m., the committee was adjourned, to reconvene on Monday, June 11, 1973, at 10 a.m.]





## S. 1142—TO AMEND THE FREEDOM OF INFORMATION ACT

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MONDAY, JUNE 11, 1973

U.S. SENATE,  
SUBCOMMITTEE ON ADMINISTRATIVE  
PRACTICE AND PROCEDURE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 3302, Dirksen Office Building, Senator Edward M. Kennedy (chairman of the subcommittee) presiding.

Present: Senators Kennedy (presiding) and Chiles.

Also present: Thomas M. Susman, assistant counsel; and Ann Landman, staff member.

Senator KENNEDY. The subcommittee will come to order.

Today we continue our hearings on proposals to amend the Freedom of Information Act. From the testimony we have had in the earlier hearings, three conclusions clearly emerge:

First, the language of the Freedom of Information Act, especially the exemptions, needs clarifying and strengthening. Even when passed, the act was criticized as being vague and ambiguous; much of the litigation arising since then has borne this criticism out.

Second, procedural safeguards against delay must be built into the act itself. Some enlightened agencies may be adopting well-intentioned regulations these days—some 6 years after the act became effective—but uniformity and congressional guidance appear necessary to insure the elimination of delays and runarounds that have become epidemic in many agencies.

Finally, the agencies themselves must take a more constructive attitude towards administering the Freedom of Information Act. In this regard, the general hostility to openness at the highest levels of Government has undoubtedly had a detrimental effect on lower-level officials. The White House Office of Communications, the Justice Department, and agency heads should stress more forcefully and consistently the rule of disclosure in dealing with the public's business.

I might mention briefly our future time frame on this issue. On June 26 we will conclude our hearings on freedom of information proposals, with testimony from Attorney General Richardson. By mid-July we hope to have our amendments finalized, so that the Subcommittee on Administrative Practice and Procedure can proceed to mark up shortly thereafter. I think we can expect congressional action in this field during this session of Congress, and these hearings are immensely valuable in building the foundation for such action.

We want to welcome Mr. Hal Taylor, the Deputy Director, Office of Communications, Department of Agriculture.

According to earlier testimony in these hearings, the Department of Agriculture has been one of the busier agencies with the Freedom of Information requests and has the reputation of denying most of them. Perhaps we can get Mr. Taylor's thoughts on the basis of these allegations and some suggestions for future improvement.

**STATEMENT OF HAL R. TAYLOR, DEPUTY DIRECTOR OF COMMUNICATION, U.S. DEPARTMENT OF AGRICULTURE; ACCOMPANIED BY WILLIAM STOKES, OFFICE OF GENERAL COUNSEL**

Mr. TAYLOR. Thank you, Mr. Chairman.

I do have a statement which I would like to read at this time.

It is a pleasure and a privilege to appear before this committee to discuss the Freedom of Information Act and provisions in S. 1142 that would amend the act. While the Department of Agriculture opposes the specific amendments proposed in the bill, it welcomes the committee's efforts to strengthen the administration of the act. The Department also is pleased with congressional interest in and support for the principles embodied in the act.

I would first like to report on past efforts of the Department of Agriculture regarding freedom of information and some of our recent developments regarding the implementation of the act.

As a public information officer for the Department, it has always been my contention that everyone in the Department should make every effort to comply with the spirit of an open door policy on information.

The Department's regulations encourage such a practice, for they state:

It is the policy of this Department to make its records available to the public to the maximum extent consistent with the national welfare and the rights of individual citizens.

With enactment of the Freedom of Information Act, all USDA agencies developed a statement of intention to comply with the law and published that statement in the Federal Register. Because of the varied activities of our Department, initial decisions were placed in the hands of program specialists—people who had the most ready access to records. Several problems arose. First, these program people frequently found it necessary to compile large quantities of materials from different files—often in different locations—in order to comply with a Freedom of Information request.

Questions arose as to fees to be charged for searching and copying records.

In October of last year, the USDA published in the Federal Register a new schedule of fees for searching and copying records to make available materials not already published or normally available in multiple copies. Not only were the fees standardized, but they also were lowered for the standard photocopy, 8½" x 14" or less from 25 cents to 10 cents.

On November 17, also last year, in reply to recommendations to Federal agencies as set forth by the report of the House Government

Operations Committee, H. Rept. 92-1419, on the administration of the Freedom of Information Act, then Assistant Secretary Richard Lyng, acting for the Secretary of Agriculture, wrote, in part:

We believe our decentralized method of handling Freedom of Information requests on an agency-by-agency basis should be continued. This method has permitted information requests to be handled in the first instance by personnel intimately familiar with the records and the program to which they relate who have the background necessary to analyze the nature and function of the requested records and make an informed judgment as to their release. Under our appeal system the head of the Department agency is under direction to make information available to the fullest extent consistent with individual privacy and with the national interest.

We do feel that our public information officials should play a more prominent role in Freedom of Information Act matters and the Director of Information is now taking steps to assure maximum participation of and consultation with public information personnel in administrative actions under the Act, in accordance with the committee's recommendation.

The Office of Information is also assuming responsibility for working with the various agencies of the Department to improve the system for keeping records of requests for information, as recommended by the committee . . .

Then on January 22, 1973, in announcing the organization of the Office of Communication from the old Office of Information, the Secretary of Agriculture delegated the following authority to the Director of Communication:

\*\*\* Advise General Officers and Agency Heads on application of information policies to comply with provisions of the 'Freedom of Information Act,' (5 U.S.C. 552), and provide consultation to General Officers when there is a recommendation within the Department or its agencies to deny written requests for information under the Freedom of Information Act.

Since that time, the Office of the General Counsel—represented by Mr. William Stokes, who is with me today and the Office of Communication have worked closely on activities regarding the Act.

We have discussed with our agencies, collectively and separately, ways to improve methods of keeping records of requests and Freedom of Information actions. In general, throughout the Department, we have urged agencies to assign information officers directly to the handling of Freedom of Information details even to the point of advising field activities where many decisions are made.

Several agencies now have information officers directly involved and we believe more will be forthcoming.

The involvement of information specialists seems already to have encouraged a willingness to provide information more readily.

As a matter of fact, to our knowledge, there have been no final denials by the head of any agency this calendar year.

These actions are beginning to pinpoint some of the problems of the Act which were difficult to administer. Our attempts, for instance, to keep records having to do with Freedom of Information requests have been most difficult if only because of problems in defining what constitutes a Freedom of Information request.

Providing people with information of one sort or another is one of the principal tasks of all employees of the Department. In most cases our field people, especially, could not be expected to distinguish between routine requests for information and Freedom of Information Act requests. Most of the time a person who wants access to rec-



ords neither relies on the Act nor appeals our decision, whatever that decision may be.

We believe the requirement in S. 1142, therefore, that each Federal agency should submit an annual report to Congress on its administration of the Act, would not be effective or useful without some definition as to what constitutes a Freedom of Information request. At least, some clarification is necessary as to what is meant by the language which provides that such a report should set out "the number of requests made" under the Act. We therefore recommend that if the committee intends to report favorably on this provision, consideration be given either to the development of guidelines that will clarify the issue or to the dropping of that requirement.

Turning to the other portions of the bill, we believe that the provision which would require the agencies to publish the index required by the Act for public inspection and copying would impose a time-consuming and unnecessary burden on our Department.

We do not believe that the public has sufficient interest in such materials to warrant the high costs of publishing and keeping such publications current.

Already the indexes are available for public inspection and anyone who wishes copies of any part of them may obtain copies by paying a fee.

Another provision of the bill would change the requirement that requests be for "identifiable records" to a requirement that requests "reasonably describe such records." The Attorney General has already interpreted the provision relating to "identifiable records" as requiring only a reasonably specific description of the records sought.

Therefore, we believe there is no need to change that requirement.

With respect to the provision imposing 10 and 20 day limits for handling requests and appeals, agencies of the Department of Agriculture have always given priority to requests for information and have complied with the requests as quickly as possible. While we agree that requests must be handled promptly we see no useful purpose in setting up specific time limitations.

Senator KENNEDY. How long would you say it takes for the average request to be responded to by the Department of Agriculture?

Mr. TAYLOR. Well, a pure guess would be less than a week.

Senator KENNEDY. Well, if it is less than a week, is there a problem in proposing, then, the 10-day period?

Mr. TAYLOR. Well, I think that having a limitation would inhibit the person's ability to make the right kind of a decision or a good judgment on it.

I think it puts another inhibition on him so that he has something else to interpret.

Senator KENNEDY. Well, if you get most of it within that period of time anyway, what additional burden is there, really?

Mr. TAYLOR. Pardon?

Senator KENNEDY. If you are complying with the time limit in the first instance, why would the fact that we make it a 10-day period serve as an additional burden?

Mr. TAYLOR. Well, I really think people would wait. They would

wait 10 days perhaps. I feel that without any kind of time limitation, they work as rapidly as they can.

Shall I continue?

Senator KENNEDY. Yes.

Mr. TAYLOR. As I say, we believe it is more important to make a correct decision than to risk making an uninformed judgment in order to meet a specific time limitation.

#### IN CAMERA INSPECTION AND EXEMPTIONS

With respect to the provision for in camera inspection of records by courts to determine their exempt status, the Department feels that the public interest would be better served by the criteria for in-camera inspection by courts set out in the Supreme Court's decision in the case of *EPA v. Mink*, decided on January 22, 1973. In that case the Supreme Court decided that in camera inspection should not be automatic, that the Government should first be given an opportunity to prove its case by means of detailed affidavits or oral testimony, and that trial courts could use in camera inspection if the agency fails to meet its burden by such other means, except in a small number of cases where the records have been classified to protect our national defense or foreign relations.

The Department also believes that 20 days would not be an adequate period of time for the United States to prepare and file its response in Freedom of Information Act litigation cases; that the need for a provision permitting the court to assess court costs and attorney's fees in such cases has not been demonstrated; and that the existing provisions of law are adequate. Therefore, we do not recommend any departure from the present language with respect to suits under the Freedom of Information Act.

There may be circumstances where Government officials may first attempt to justify a denial for information on a specific exemption without determining fully the reasons which might more appropriately justify an approval. In other words, the effectiveness of an individual in receiving the information he requests often depends on the spirit with which the Federal agency or employee seeks to serve him.

It is our opinion that changing the language of the exemptions to make them more restrictive would not necessarily improve that spirit of openness which we all seek. Perhaps changes could help eliminate confusion over exemptions that are expressed in rather general terms, yet the experience of our Department, and particularly recently, has been that the present language has proved workable if a positive approach to making information available is applied. Therefore, we recommend that no changes be made in the language of the exemptions at this time because the proposed language would make them more complex and difficult to comprehend by the average field officer who has to interpret them.

The Department of Agriculture is fully committed to the principles embodied in the Freedom of Information Act. We believe we have made considerable progress recently in administering the act under present procedures partly, I hope, because of the increased

input by information officers. If the committee can give us guidance in clarifying merely a few ambiguities, yet leave us room for some flexibility and judgment, we believe we can attain the fulfillment of the people's right to know which we would all like to see.

That completes my statement, Mr. Chairman.

Senator KENNEDY. Thank you very much, Mr. Taylor.

On the exemptions from disclosure, do you have a breakdown as to under which categories the Department has denied information under the Freedom of Information Act?

Mr. TAYLOR. You mean in the past?

Senator KENNEDY. Yes.

Mr. TAYLOR. Not specifically.

Maybe Mr. Stokes may help me.

Mr. STOKES. We do not have any statistics, Mr. Chairman, but most of our requests which give us trouble are under exemption 4, exemption 5, and exemption 7. These are, of course, not the routine type request. I think when Mr. Taylor mentioned that most requests are handled within a week, he was talking about the routine type of request, and this turns upon the problem of how you define a request also.

#### DELAYS

But the ones that give us trouble are the ones in which we give consideration to whether some of the exemptions are applicable, and these are under those three exemptions that I mentioned. And while we have no statistics on the number of days it takes us to handle an initial request, when the Moorhead committee held hearings last year, or in 1971, I believe we determined that appeals took us about 50 days to handle, and, of course, these were complex cases that contributed to this period of time.

Senator KENNEDY. Why does it take so long for the appeals? Granted that the material has been collected and filed and processed, why so long?

Mr. STOKES. Well, one of the problems is what we could call the problem of the massive request. In this type of request we do not get a request for 1 record or 10 records or 100 records. We get a request for all the records falling within a described category over a period of time, perhaps 5 years.

The first problem we have is what do we have falling within that category? This takes the time not necessarily of just secretaries and clerks but the time of professional officials, administrative and legal, to determine what we have first of all, and then whether there is anything that keeps us from making this available.

Now, most of the requests we received from the Center for the Study of Responsive Law, for example, were what we would call massive requests. Just reading to you from their letters, the requests would take 15 or 20 minutes just to describe the categories of information that they asked for. This is why it takes a lot of time.

Senator KENNEDY. Well, why not consider these kinds of massive requests or global requests in one way and then the routine requests that come in for information in a different way?

Mr. STOKES. I think if we could define the type that falls within the routine category, the Department would have no trouble comply-



ing with the time limitations although I would see no purpose in it because in that case we do not have any trouble getting them out promptly. We have thousands of requests for information every month.

Now, what is to be classified as a freedom of information request for purposes of time limitations? Is it one in which you have a problem as to whether you can make it available without harm coming to the national interest or individual privacy? So I think this. If you try to separate them, you would have a question of what is a routine request and what is a Freedom of Information request.

Any time we have a question and discussion among administrative people and lawyers as to whether an exemption is applicable, you frequently have division of opinion. This is true not only in the Department but also in the Department of Justice, in the district courts, and in the courts of appeal.

The exemptions are not that clear and you have splits of—you have conflicts between the circuit courts, for example, on what certain of the exemptions mean.

#### USDA LITIGATION RECORD

Senator KENNEDY. Well, in the areas in which the information has been denied where the Department has been brought to court, what has been the record of the Department?

Mr. STOKES. As I recall, the Department has been involved in six lawsuits.

I believe four of these lawsuits were brought by the Center for the Study of Responsive Law.

In the first case that the Center brought we had four categories of information involved. The Government prevailed upon two of those categories and the Center was successful in obtaining two categories of information.

In the second case that the Center brought, this was—a request for 14 broad categories of information under the pesticides registration program when this program was under the jurisdiction of the Department.

When the request was filed, the administrative officials attempted to sit down with representatives of the Center and try to reduce this request to some kind of manageable proportions. They were unable to do so. Some information was made available but most of it was denied for failure of the Center to be specific about the request.

When the Center filed the lawsuit in the district court the Department conducted a study of just what the Center was asking for and concluded that they were really asking for access to 43,000 files which measured over 1,500 linear feet, three times the height of the Washington Monument—and that each one of these files included a document falling within at least one exemption category of information. There was actually a statute which prohibited disclosure of certain information in each of these files.

The Department concluded that it would take thousands of man hours to separate the exempt information from the nonexempt, to make the files available for public viewing, than it would take of

professional time to do this. Clerks couldn't do it alone. Secretaries couldn't do it alone, although it would also take their time. And it would cost \$91,000 to conduct this kind of review of the files that the Center was requesting.

When the case was heard in court, an affidavit to this effect was Department, and looked at the files. The Judge then issued an order that the Center was entitled not to 14 categories of information, but only part of one category and this was the index file of manufacturers of pesticides. The Department was permitted to make certain deletions even on this file.

Harrison Wellford of the Center spent about 2 hours in the Department looking at this file and that was the end of the case.

So I would say the Department prevailed on most of the information requested there because no one put up the \$91,000 for the Department to make this study and review.

In the other cases—one case involving meat inspection records was an outright victory for the Center for the Study of Responsive Law. The decision was against the Department.

We have two cases now pending in court and they are both on appeal, one by the Center for the Study of Responsive Law and one by the Georgetown University Law Center.

Senator KENNEDY. What are those on?

Mr. STOKES. Both those requests were for investigation reports. The one by the Center for the Study of Responsive Law is for OIC, Office of Inspector General, civil rights investigations, and again there are over 100, if I recall correctly, over 100 investigation reports involved in that lawsuit.

Senator KENNEDY. What is the basis for not making that material available?

Mr. STOKES. Primarily exemption 7, also exemption 5, and I believe we relied on exemption 4 because there was confidential material in the investigation reports.

Senator KENNEDY. What type of information? Is that financial information?

Mr. STOKES. Pardon?

Senator KENNEDY. Is that financial information or commercial information?

Mr. STOKES. As I recall, it would not be financial information in the strict sense of the term. These would be statements by witnesses interviewed by the Office of Inspector General. They would be statements given to the Department in confidence and this would be within the Government's interpretation of exemption 4.

Now, I realize that some courts have disagreed with the Government on the interpretation of exemption 4, stating that the exemption applies only to trade secrets or commercial or financial information in the strict sense of the term.

The Government, Department of Justice, disagrees with these decisions.

Senator KENNEDY. Well, if the courts have ruled one way, how do you adjust or accommodate your regulations and interpretations to comply with the court decisions, or do you?

Mr. STOKES. Well, we have had decisions from various district courts which disagree on the interpretation of the exemptions, so the

decision of one district court would not necessarily cause the Government to change its position.

We also have conflicts among the circuits, as I mentioned. So generally the decision of one court would not require a change in our position. However, to be practical about it, we know that if a decision is against us, for example, in the district court, then we must contend with that decision and this is taken into account in whether a discretionary release is made of information.

Senator KENNEDY. Well, doesn't that underline the importance of developing a statute so that we get some consistency in interpretation on these matters here? You say we get some courts deciding one way, others deciding another and, the Department here does not know what to do.

I suppose there is a general inclination to be more cautious in making materials available because unless overturned in court, the people who make that material available are not going to get themselves in trouble. Why isn't it important that there be statutory clarification in some of these areas?

Mr. STOKES. I do not know that the Department would disagree that some clarification would be desirable. However, all of the proposals in this bill are restrictions on exemptions which, as a general rule, at least I feel, and perhaps I should speak personally here, that they would restrict the exemptions so as to exclude from exemption some material which should be withheld from the public in the interest of individual privacy or the national interest.

Senator KENNEDY. Where is the national interest here? I can see national interest in defense or foreign policy, as it applies to the Department of Defense, but why is it in the national interest to withhold information by the Department of Agriculture?

Mr. STOKES. Just to take one example, I think anytime our investigators talk to a witness and this witness is speaking in confidence, he is not expecting his statement to appear in the newspapers. He is honest and candid with us. Our investigators feel that if his statements are disclosed, for example, to the public, this will impair their ability to conduct effective investigations. That is one example.

We also feel that the disclosure of some investigation reports prior to the use of the material in enforcement actions would also impair the use of the investigations. We feel that the release of certain material which would fall within exemption 5, recommendations, opinions of intermediate level officials, would be impaired if these statements are made public.

I think all the reasons that are given for the exemptions in the first place have some application.

In my view, at least, the exemptions should not be further restricted.

#### INTERNAL MEMORANDA

Senator KENNEDY. Do you think that, if the authors of those memoranda written by individuals within the Department knew that they were going to be public, the public interest would be served or compromised by disclosure?

Mr. STOKES. It is hard to be categorical.



I think there are some documents which include this type of analysis in which opinions are expressed which would be harmful to the public interest to release. I think you—

Senator KENNEDY. What sort of things?

Mr. STOKES. Well, for example, I think a meat inspector in a slaughtering house who is candid in his statements of the opinion of the sanitation of a plant to which he is assigned would prefer that his opinions did not appear in the newspapers the next day in the locality where he works.

Senator KENNEDY. What about the public's interest? They are eating meats that are going through that plant—it may be difficult on the inspector, but what about the people who eat the meats that go through there?

Haven't they got a good interest?

Mr. STOKES. I may not have picked out the best example. I picked out an example in which the district court disagreed with the Government. But I think there are occasions in which people speak more candidly if they can be assured that their statements are directed only to the person for whom they are made, and if they are making the statement for the public as a whole, their statements would be entirely different, or at least be somewhat affected by this factor.

It is hard to bring examples to mind right at the moment but I think this is the way Government officials feel and I think—

Senator KENNEDY. I do not question that they feel that way. It is legitimate to ask, however, whether that is really the result or not. Not that they wouldn't be more concerned that the material be made public, but I cannot imagine that in these days many people who write memoranda don't assume they are going to be made public. With constant publication of internal memoranda, I just do not know whether that rather pervasive feeling really exists within all of Government or whether it is really legitimate.

Mr. STOKES. Mr. Chairman, are you denying that there are such—there could be such an effect on the work of some official, that there could be some effect on the type of recommendation he makes.

Senator KENNEDY. I am sure that there are a lot of people that it would have an impact on. I do not know that those are the people who ought to be in those departments, then. Maybe you need to get some other people in there who are going to call them as they see them.

Mr. STOKES. What do you think the purpose of exemption 5 is, then? Why did the Congress carve out an exemption for exemption 5?

Senator KENNEDY. It obviously did refer to some of the reasons you pointed out, but I think we are trying to find out whether those are really legitimate. I am always questioning a lot of things that Congress has done that I do not agree with, you know. And I think that this is the point when we are trying to find out whether we need to perpetuate things.

If your question to me is whether in any particular kind of agency we want people who are going to be so concerned about how their views or opinions are going to be reviewed, either by their superiors or by the public—whether the public interest is better served by a

continuation of the protection for that type of person in any given kind of agency as opposed to somebody who would be willing to call them as he sees them and be willing to say this is what I think and then take their chances on it—I am not sure.

Mr. STOKES. Well, I think it is hard to generalize because I think there are some documents falling within exemption 5, literally falling within exemption 5, which would not be harmful to disclose and this is why in many in all cases in which we are consulted, the first question we ask is why can't it be made available? What would the harm be to the Department and the Government if it is released? I think you get this kind of question, not only from the lawyers but also from the communications people, the information people, so that our record is improving. It is difficult to withhold information. It is difficult because you have to justify the withholding more often than you have to justify the disclosure. So I think for this very reason the Government, the Department and the Government as a whole is improving its record in making information available.

Senator KENNEDY. Has the Department been brought to court because of release of information obtained from different companies?

Mr. STOKES. No, we have not. We have a case pending now in which we are threatened with lawsuits from both sides. We are threatened with a freedom of information suit if we do not make a record available. We are threatened with an injunction if we propose to make it available by the party which submitted it to the Department. So we have never had a lawsuit but we do have that practical problem right at present.

Senator KENNEDY. What sort of materials does that deal with?

Mr. STOKES. This was a—I hesitate to go into great detail since it—

Senator KENNEDY. I was just interested generally.

Mr. STOKES. Generally it was a letter submitted to the Department marked Strictly Confidential, which related to the activities of another party and certain alleged wrongdoing by that party. The party that was affected asked for a copy of this letter. The party that submitted the letter wrote a followup letter stating that it was submitted in confidence, he intended it to be treated in confidence, and that he would sue if it were released.

Senator KENNEDY. What about the material itself, the substantive part of the material itself being released without the identity of the individual.

Mr. STOKES. The party requesting the record knows the identity of the individual. In fact, those two parties are engaged in litigation in the District Court at the present time over an antitrust matter which I don't know the details of. But the letter submitted to the Department would not be classified as involving trade secrets and commercial or financial information in the strict sense of the term of the party submitting it. Therefore, we have a question whether it is exempt under exemption 4, also a question whether it is exempt under exemption 7. These questions have not been resolved.

Senator KENNEDY. When should an investigative file no longer deserve the merits of classification?

Mr. STOKES. Excuse me?

Senator KENNEDY. When should an investigative file be made available generally to public scrutiny?

Mr. STOKES. I think this is hard to say. I do not think it necessarily turns upon whether the file is still to be used in an enforcement action as some district courts have stated, and some courts of appeal.

There are other reasons for exemption 7, as you know, Investigative techniques, for example, can be divulged by releasing an investigative report. I am not the best one to describe what those investigative techniques are but the investigators feel that if you release their reports consistently, you will reveal their techniques for following leads and that type of thing.

Also, we have in investigation reports information which may be exempt under other categories, under the other exemption categories, such as confidential information, such as internal communications and memoranda. So I do not think that the fact that the report is no longer to be used specifically in an enforcement action is the critical point to be considered in determining whether it could be released or not.

Senator KENNEDY. Then it is rather a subjective decision that is actually being made by your people as far as—

Mr. STOKES. I think that is right. Most of our reports which are based on investigations by the investigative arm of the Department we feel fall within the exemption for investigatory files, but many—at times the Office of the Inspector General and the Department—release these reports under their discretionary authority when it is determined that it would not be harmful to the public interest to do so. So it is really a matter of balancing the competing interests involved and I think the emphasis is always given to—we always lean towards—disclosure if that is possible without harming the Department's work.

Senator KENNEDY. What about establishing this as a criteria, based upon your working with the act, "Investigatory records compiled for law enforcement purposes but only to the extent that the production of such records would (a) interfere with enforcement proceedings, or (b) deprive a person of a right to a fair trial or impartial adjudication, or (c) disclose the identity of an informant, or (d) disclose investigative techniques and procedures?"

Would that cover your concerns, that test?

Mr. STOKES. I would prefer not to comment upon whether that would be good without further study.

Mr. Taylor?

Mr. TAYLOR. It sounds better to me than the one that is proposed if only because the one that is proposed is an exception to an exemption and it seems ambiguous.

Senator KENNEDY. You were just mentioning the statute prohibiting disclosure of certain information in your files. Do you remember that?

Mr. STOKES. Yes.

Senator KENNEDY. What statute was that?



Mr. STOKES. Well, one statute, if I understand your question, would be 18 U.S.C. 1905. This is the one I think that is applicable to the Government as a whole. We have certain statutes in our various programs—such as the one in the Pesticides Program which are more specific and are directed to a particular program. But 18 U.S.C. 1905 would be one statute that we must consider when we get a request for information.

Senator KENNEDY. That relates to trade secrets which are exempted by the Freedom of Information Act, section 4?

Mr. STOKES. I think if you had a matter which was prohibited from disclosure by statute, it would fall within both exemption 3 and perhaps exemption 4. Many times it would fall within both exemptions.

If a statute prohibits the disclosure it could very well relate to trade secrets and business information which is prohibited, would fall within both exemptions.

Senator KENNEDY. Don't all the exemptions cover substantially what is included in that section?

Mr. STOKES. Do the other exemptions cover what is included in exemption—

Senator KENNEDY. 1905.

Mr. STOKES. Exemption 3? I think as a general rule exemption 4—I think our experience would indicate that exemption 4 would be applicable in any situation—in all situations that have come to our attention.

Now, I do not know that I can make a blanket statement that all of them would fall within 4, but that has been my experience in handling Freedom of Information matters.

Senator KENNEDY. Do you make meat inspection reports generally available to the public?

Mr. STOKES. There are many different kinds of meat inspection reports. As I mentioned, the Department was unsuccessful in the one case that was recently brought under that program, and I might say the Department's administration of the meat inspection records is more liberal since that decision but I do not think I can give you an answer categorically as to whether meat inspection reports are made available. The reports involved in that decision as I understand it are now being made available by the Department administratively.

Senator KENNEDY. What about other reports that are similar to them? Would they be made available, too?

Mr. STOKES. They would be if the Department determines that the harm that would come to the operation of the government would not preclude it. It is just hard to—unless you focus in on a particular record—it is hard to say whether the Department would make it available or not.

I would say the Department's position is more liberal in this respect than it was a year ago or 2 years ago and I think this is true throughout the government and I think it results in part by the court decisions that have been rendered, in part by the influence of the Department of Justice, in part by the influence of information people in the program.

Senator KENNEDY. Why do you think it has to be only as a result of the court action?

Why aren't there initiatives even within the——

Mr. STOKES. I do not believe I suggested it was only a result of court action but I think this is a natural reaction. If you lose a lawsuit, especially if you appeal it and lose it in the court of appeals, you begin to have some doubts as to whether your position was proper to begin with. This is natural.

Senator KENNEDY. Don't you have any of those doubts even prior to the time you have to litigate?

Mr. STOKES. I think we have doubts. We have differences of view within the Department. We have differences of view with the Department of Justice at times. District courts differ as to the interpretation of exemptions. Courts of appeal differ as to what an exemption means. So you are bound to have differences of view among—when you are dealing with people, lawyers and administrative officials, as to what the exemption means.

Senator KENNEDY. Well, doesn't the act itself resolve those doubts in favor of public disclosure?

Mr. STOKES. I think the act certainly—the spirit of the act is to resolve them in favor of disclosure and I think this has been the essence of the court decisions. Most——

Senator KENNEDY. I am not interested now about the courts. Why not administrative decisions? The track record is quite clear on court decisions, but my question is why they have to be wrung out of the courts rather than being worked out within the agency.

Mr. STOKES. I think you would have legitimate differences of opinion and, of course, you still have differences of opinion as to whether some of the court decisions are in the best interests of the government, but I think the natural result that you get from an adverse court decision is to influence you towards disclosure in the future.

I am not suggesting that this is the only reason. I think the work of the various committees, your committee and the Moorhead committee, has helped instil this spirit of openness, but I am merely suggesting that the court decisions are certainly one factor that cannot be ignored.

#### AFFIRMATIVE DISCLOSURE EFFORTS

Senator KENNEDY. Well, you won't get disagreement on that. But as far as the history and the purpose and thrust of the legislation, it was obviously to open up the processes of government. We hear the description you have given in terms of decisionmaking within the Department about whether they will give out certain information or not—there is a disagreement, yet outside of the court decisions, there is very little apparent relaxation of secrecy or additional available information for the public.

Given the fact that the legislation was developed to make more information available rather than to limit disclosure, I find this to be distressing.

Mr. STOKES. I am not sure I understand precisely——

Senator KENNEDY. Well, let's take specifically in the last couple of years what the Department has done to make more information

available to the public in any one of these areas that we have been talking about this morning, say in meat reports, inspection reports, investigative reports. It would appear to me that the principal progress has been made as a result of court decisions and not by administrative decisions within the agency, and if I am wrong in that impression I wish you would clarify and indicate to me specifically what has taken place within the Department in these areas that would show to the contrary.

Mr. STOKES. Well, it is hard for me to determine the precise percentage that—the effect that a court decision would have. I think the spirit of openness has come about for various reasons and what I intended to say, and I may not have made myself clear, I think the court decisions by their very nature had an effect. I don't think that was the entire cause of the change in our Department's view and in the view of all agencies.

I think you have a greater appreciation of the importance of freedom of information but whether—I couldn't say how much of it results from court decisions, how much results from education of personnel in the Department working on freedom of information matters.

Perhaps Mr. Taylor would have a comment.

Mr. TAYLOR. Well, I have been trying to think here, if you mean, Mr. Chairman, that as a result of these court decisions we should have offered new inspection records, and so forth, made them available without a request, I think that perhaps it is not the right way to do it. In the past the Department has operated on the basis of providing information if requested, no matter what it is. Information people, for instance, develop things, of course, to be made available to people who have a standing request like the mass media, but I guess perhaps we may have assumed that the result of a meat inspection activity was not necessarily of a great deal of interest unless asked for.

I think what Mr. Stokes is saying, however, is that since the problems with the court cases, we do have a tendency to more freely give people what they ask for. Maybe we are not taking the initiative as we should, but perhaps this will come. At least we are not saying "no" to people as often perhaps as we used to, even on topics that have been considered exempt.

Senator KENNEDY. In any review of the legislation itself and the various exemptions that were developed, one would gather that it was not the intention of the Congress that these were going to be the absolutes, but it was hoped that the various agencies would still feel that they could make available information in any of these exempted areas that was important to the public interest.

Mr. STOKES. I did not intend to imply that the Department uses this as a basis, as a mandatory withholding. The Department does not view the exemptions that way.

The first question we ask, even though it falls within an exemption, why can't we make it available under the discretionary authority given to the head of each agency by the Secretary of Agriculture? Many of our records are made available under that authority even though we feel that they fall within one or more of the exemptions in the Freedom of Information Act.



So the question of whether they fall within an exemption is not determinative of whether they are made available. It just does not work that way.

Senator KENNEDY. Well, thank you very much, Mr. Taylor.

We want to thank you, Mr. Stokes.

Mr. TAYLOR. Thank you.

Senator KENNEDY. The next witness is Mr. John Miller, here today as chairman of the administrative law section of the American Bar Association. Mr. Miller is a practicing attorney in Washington and an adjunct professor at Georgetown Law School. He testified before this committee a few years ago in support of a bill to establish a Federal Administrative Justice Center, and was most helpful to us at that time.

He is accompanied this morning by Mr. Richard Noland, vice chairman of the freedom of information committee of the Administrative Law Section.

We look forward to your testimony.

**STATEMENT OF JOHN MILLER, CHAIRMAN, ADMINISTRATIVE LAW SECTION, ACCOMPANIED BY RICHARD NOLAND, VICE CHAIRMAN, FREEDOM OF INFORMATION COMMITTEE**

Mr. MILLER. Mr. Chairman, we appreciate the invitation and opportunity to appear before you to testify before these hearings on behalf of the section of administrative law. We have been long concerned with the problems relating to public access to government records.

We have prepared a statement, Mr. Chairman, which I ask be copied in the record as though read.

Senator KENNEDY. It will be so included.

Mr. MILLER. Rather than read it, I would like to just make a few remarks. Then we will be available to answer your questions.

We believe that the Freedom of Information Act is serving a useful and necessary function in our society and has generally proved to be workable. The main problem is one of enforcement, particularly at the lower levels of government. Despite general compliance by most agencies, some problems have been encountered in receiving prompt replies to requests for agency records.

We understand that these hearings are being held in the light of S. 1142. Our comments and our prepared statement relate to that legislation.

I should like to comment briefly on a few of these matters.

First, we do support the establishment of specific time limitations in order to assure that agencies reply promptly to requests for records. In our view these limitations could do as much as any single measure to assure effective enforcement of the Freedom of Information Act, especially at the lower levels in the Government. However, we believe that there may be legitimate grounds for allowing an extension of time for an agency to respond to a request for an agency record in certain instances. With this in mind, we suggest that you look to the uniform regulations in implementation of the Freedom of Information Act which were recommended by the Administrative

Conference of the United States in its Recommendation No. 24. They have suggested time frames. They have set forth grounds when an exception for additional time might be allowed and the necessity of keeping the requesting party advised as to why additional time is needed and when the records will be made available or denied after further study or investigation or search for the files.

Second, we agree with the objective of the proposal to empower the courts to review security classifications by the Government. While courts are generally not equipped to deal with policy questions involving—

Senator KENNEDY. May I ask you, Mr. Miller, about the idea of changing, reversing the time limitation, giving 20 days for the initial time for response by the agency and then a 10-day period for the appeal, with the idea that the various material is initially collected and brought together with a longer deadline.

Mr. MILLER. I think we favor the initial short period. Probably most documents could be supplied within that period of time.

We are considering a little longer period where there is an obvious difficulty. The records are at a distant location. There is a problem of getting someone to look at the classification, for example, too see whether it is still under national defense or foreign policy. There is a legitimate reason for slowing down to look, either find the documents or classify them. That may take a little bit more time, but I would hate to encourage the agency in the first instance to take the long period.

#### IN CAMERA INSPECTION

Coming back to the problem of giving a district court the power to review security classifications, while we would admit that the courts are generally not equipped to deal with policy questions involving national defense and foreign policy, we believe that judicial review of security classifications to determine whether they are consistent with applicable criteria can provide a salutary check on executive action. In our statement, we have suggested some specific language to achieve this end.

Third, we believe that—

Senator KENNEDY. Now, just before we leave that section, how much of a burden is it on the courts to examine the records in camera?

Mr. MILLER. In the case of national defense? As I understand it, under the *Mink* decision all the court has to do is see whether or not the document was classified. The recommendations that we make would go a little bit further than that. In other words, the enquiry would extend to whether or not the classification meets certain criteria set up by the executive branch, by the President. That would enlarge the function of the court. It would impose an additional burden, if you will.

The court under our recommendation would not have to handle the matter in camera in every instance. This would be discretionary with the court. If it was deemed necessary to look at the documents, the court could. We think as long as the court has a discretion, it would substantially lessen the burden on the court and make the function more meaningful.

Senator KENNEDY. There also has been a suggestion about permitting the courts to review whether it is possible to separate some of the documents from those which are classified. Do you have any reaction to this?

Mr. MILLER. We support the recommendation of the Administrative Conference of the United States that this separating function ought to be carried out so that documents are not suppressed simply because some part of them contains classified information.

Senator KENNEDY. Now, it also has been suggested by some of our witnesses that you permit an adversary procedure to develop in the examination of the materials and that perhaps the attorney should be allowed access to the information to be able to at least raise some questions on the appropriateness of the classification.

Do you have any reaction to that proposal?

Mr. MILLER. We have not considered that in any formal way, Senator, so I have to respond in an individual sense.

Senator KENNEDY. Yes.

Mr. MILLER. I would divide this into certain categories. Possibly in cases of national defense and foreign policy, the private attorney might not have any claimed right to look at the material. But let's talk about something like intraagency memoranda which may be very important in a heavily litigated case.

The attorney is very concerned as to whether the agency actually received advice from its staff contrary to the evidence of record. There I can see the lawyer possibly being afforded the opportunity to look at the document without thereby obtaining he right to publicize what is in it. It is part of his opportunity to get access to the facts as opposed to, advice that the staff gave to the Commission. I do think it is important to protect the right of the Commission or public official to look to his staff for advice.

Senator KENNEDY. OK.

#### EXEMPTIONS

Mr. MILLER. Third, we believe that certain of the exemptions already in existence should be amended to assure that information be made available to the maximum extent possible. At the same time there is certain information the disclosure of which would invade personal privacy, and some information received by the Government from a citizen in confidence that the section believes normally should be protected against public disclosure. Our statement sets forth proposed amendments to several of the exemptions which we think would serve these purposes.

If I may just allude to them briefly, the second the proposed amendment we think might be so narrowly construed by the court that certain guidelines, internal guidelines in the agencies, might become public which would not serve the public interest. We mention them in these terms in our statement.

For example, the allowable tolerances for prosecution, negotiating techniques for contracting officers, schedules of surprise audits and inspections. It would hardly be useful to have it disclosed publicly when the purpose of the surprise audit of a bank or some other institution is too see them when they aren't prepared for the audit.



So we think some language changes would be desirable in order not to interfere with the functioning of the agency.

In the fourth exemption which we believe has been the most controversial—this has to do with the disclosure of trade secrets—we think that the construction of that exemption if limited solely to commercial matters is not serving the public interest.

We think it should go a little bit beyond that to noncommercial and nonfinancial information.

In our text we suggest the problem of the aircraft accident safety investigation where it is far more important to get candid answers for safety reasons even though a separate and distinct problems, tort liabilities, are inherent in the situation.

Since writing the statement it has been suggested too me that another area might well be the complaints made to the inspector general in the military services.

If the soldier were to learn that as soon as he made a complaint to the inspector general it would become known to his superior officer, that avenue of information would probably quickly dry up. The soldier would realize he would be subject to the subtle pressures that come about when a superior knows that the soldier is going around him, through authorized channels, true. But it would make life difficult and would interfere, I think, with the function that is supposed to be performed.

The sixth exemption has to do with personal medical files and similar files. We would amend it to make the exemption a little narrower than it is at present.

We do support your suggestion that the word "files" be changed to "records" because the terminology that now exists can be used as a device for concealing information that really is intended to be covered by the Freedom of Information Act and made available to the public.

The seventh exemption, Senator—you have already read into the record our suggested modification.

In that connection, I believe you raised the question as to how long the investigatory files or the administrative files should be kept secret. How long should they be under the exemption?

We think that with passage of time, and, using our definition of investigatory records, when the investigation is all over and the purpose and point of it has expired, it would no longer be an interference with enforcement proceedings and there ought to be disclosure. In other words, the very criteria we would use would, I think, assist in making public certain investigatory files.

Our criteria would still require the protection of informers. We hope that the other criteria would still obtain.

I think we are now available for comments or questions, anything, Senator, you would like to discuss with us.

Senator KENNEDY. Just on this subsection (d), the disclosure of investigative techniques and procedures, couldn't that really become a catch-all to keep materials from the public, investigative techniques and procedures?

Mr. MILLER. You mean just make that one of the exempt items?

Senator KENNEDY. Aren't you concerned that that might be used

as a loophole by which materials would not be made available to the public?

Mr. MILLER. I think all of these are subject to abuse if that is what you mean, Senator. A generous interpretation of any one of these exemptions would serve to limit materials the public should have access to. But we believe that if—

Senator KENNEDY. It does not have necessarily the precision that some of those other sections have. I can remember when the Constitutional Rights Subcommittee had the Attorney General up before it, we were just asking for the FBI Manual and we were denied it, something as basic and fundamental as that. I was trying too find out what use is made of informers and how it developed, other different kinds of information to understand better how the agency works. I am concerned that an exception for information which disclosed investigative techniques and procedures could become a vehicle which the agencies will use to deny even further information to the public.

It would appear to me that the other criteria, (a), (b), and (c), have a good deal more precision about them disclosing the identity of an informer. That is pretty precise. Depriving a person of a right to fair trial is pretty precise. Interfere with enforcement proceedings, maybe less so. I think that could be understood. But this last one in terms of its breadth, is a matter of concern. I am just wondering what is your view on it.

Mr. MILLER. I think your analysis is correct. Our category (d), the disclosure of investigative techniques and procedures, is a more difficult concept than the three that precede it. But we believe there is case law arising out of private suits involving discovery which would help too develop an understanding of that.

Senator KENNEDY. OK.

Let me ask you about internal memoranda. We have talked a little about that with some of the witnesses here, about how much protection ought to be granted to these internal memoranda, either between the agencies or individuals and their superiors, and how available they ought to be to the public. Could you just review—you do not have any comments on that, do you, or—

Mr. MILLER. No, sir.

SenaoR KENNEDY. Tell us what your recommendations would be, or at least could you discuss some of your concerns, give us some guidance as to the way that we ought to proceed?

Mr. MILLER. The bill itself did not address itself to this. Our statement did not. And so what I say must be treated as a personal statement. We have not had an opportunity to clear it.

Senator KENNEDY. Right.

Mr. MILLER. It seems to me that this problem has several dimensions. I mentioned one earlier.

Let's take the regulatory agency situation. You have a litigated case. The parties who have fully presented evidence, briefed the matter to the agency, and so on, are obviously concerned about any kind of memoranda that might go to the agency from their staff as to whether or not it fairly states the evidence in the case, the arguments made, and so on; even though those memoranda come from

staff employees who were not directly involved in the case, who normally now under a separation of functions would appropriately be able to advise the commission.

As I say, we are concerned with what the commission is told in that instance. I think a moment ago you indicated that it goes a little bit beyond the bounds of candor for someone to say in a situation like that, in the form of an intra-agency memorandum, something which does not bear repeating publicly. It suggests that people can say things that are irresponsible.

But once you get away from that well formed framework and you enter into what you might call the areas of discretionary justice, it is a little harder to be precise as to the desirability of making public any kind of intraagency memorandum. There is no doubt that a lot of what is written in the Government has to be written on the basis of insufficient information. Someone is suggesting that something needs looking into on the basis of rumor or comment or some unsubstantiated allegation that is made. I think once you get into that area, then the concern is whether or not publication of the intra-agency memoranda would injure someone's good reputation. There you get into the problem of the protection of privacy. You become more concerned when you get into the informal kind of a memorandum.

The third category which was mentioned by the gentleman from Agriculture is where a citizen has brought a matter too the attention of the agency. That isn't necessarily an intra-agency memorandum but it may be the basis for the agency's action. When you were reviewing that with the gentleman from Agriculture, it recalled to mind a situation perhaps more than 10 years ago where a committee chaired by Congressman Celler was examining the enforcement activities of the Maritime Commission. There they found an interesting situation had developed.. A shipper who felt he had been oppressed by the owner of a shipping line, the ocean line, would make a complaint to the agency. The agency would just simply make a copy of it, send it to the owner of the ship for comments. Apparently there was evidence that the owner of the ship would then send to the shipper someone who would suggest too the shipper that if he wanted his goods to be shipped, he had better stop sending memoranda like that to Washington.

In that kind of a situation it is self-defeating to make the complaint public. Whatever purpose it might serve in an individual case, the moment it became well known that anything you tell to that agency in an effort to get them to look into what you consider an oppressive situation, the person oppressing you will know immediately about it and in all of the subtle ways people can exploit a situation like that, could then injure you. Then I think one has to pause.

Senator KENNEDY. Say a congressional committee is interested in that. Couldn't that material be made available to a congressional committee and just leave the names out of it?

Mr. MILLER. It could, but let's say there is only one person in that category who could have complained. There is a judgmental factor. If there are 1,000 people who might have complained, then the suppression of the name of the actual complaining person of course would give the oppressor no insight into who did it.



Senator KENNEDY. Well, how do you build in that kind of flexibility? I can see that the example you have given about Maritime sending a complaint to the shipping line obviously falls into the kind of concern which you have expressed, but I—

Mr. MILLER. I would say—

Senator KENNEDY. I would think availability to groups considering legislating in this area would not be as harmful, and I am just wondering how you systematize it.

Mr. MILLER. Well, first, the act does not apply to Congress as I understand it. Senator.

Senator KENNEDY. That is right. We are talking, I suppose, in a broader sense although we have not gotten into that today about whether we apply it as well to the Executive and the Congress. There are a number of people, true, that feel it should.

Mr. MILLER. Yes.

Senator KENNEDY. And I think we would be interested in that particular feature in other areas.

Mr. MILLER. Now, perhaps the very instance that I raised would be covered by the interference with inforcement proceedings, the category of exception we would write in in lieu of the present language. So maybe my apprehensions would be laid to rest if you did adopt the language we suggest.

#### ATTORNEYS FEES

Senator KENNEDY. Do you have any views about attorney's fees and the compensation and the allocation of expenses in some of these contests and how that ought to be worked out?

Mr. MILLER. We are already on record as supporting such proposals and reimburse attorney's fees.

Senator KENNEDY. The point has been made that a case ought to be made by the plaintiff as to need. I think the point was made yesterday that if you had a contest between Lockheed and Boeing about SST information, the Government should not be getting into compensating one of these parties. How you handle that particular situation versus legitimate pro bono efforts by either individuals or the press.

Do I understand you to say that you want to build some flexibility into the system that would permit the courts themselves to consider the basis of need of the one who is suing?

Mr. MILLER. Yes; we would have the matter discretionary with the court. But I am not sure that need alone should be the criterion that ought to determine the matter. After all, the purpose is to compel the Government to disclose and there may be a salutary effect in just having the fee reimbursement even where the party is affluent, particularly if the affluence is illusory, that is, the Government ends up paying for the affluence in any event.

#### ACCOUNTABILITY

Senator KENNEDY. We have Senator Chiles here who has been very, very much interested in this whole subject matter and has tes-

tified very helpfully before the committee earlier. We want to welcome him here.

One of the suggestions that I made last week was to have the appeals of denial of information be resolved by some independent agency, perhaps the Administrative Conference. I don't know whether you have any kind of reaction to that. Also I made the suggestion that there be some identification of the individuals within a governmental agency who are actually involved in the denial of the request so that the public would know which individuals are exercising the responsibility in this area.

Senator CHILES thought, and he might address himself to that point, that it would be valuable to have at least one person within each of the agencies designated as the person responsible for making information available to the public—have one person in each agency of Government bear the final ultimate responsibility so that he would have some kind of visibility.

Do you have any reaction to some of these points raised during the course of these hearings?

Mr. MILLER. Yes, I do, Senator.

Again it goes beyond our statement, so may I speak personally in response to it?

Senator KENNEDY. Yes.

Mr. MILLER. The last suggestion first. It isn't clear to me yet whether you have in mind identifying the person who in effect will have to suffer the sanctions for failure to provide the documents. If that is the case, I think it is a good idea even though it would be identification of the office, I know, the chairman of an agency, the secretary of the department, or who. It would be salutary.

If you say that what they have to publicize is the name of the incumbent, it may be awfully hard to keep that up to date. I do not think nowadays are unique in that sense. It is hard to keep—

Senator CHILES. One of the problems today is that when you go even within an agency you are shuffled. Just the request goes in. The agencies themselves have not designated anyone, and so that just goes routinely from one desk to another.

Mr. MILLER. Yes.

The recommendation 24 of the Administrative Conference of the United States had urged the various agencies and departments to do just that. To the extent they haven't I think they have failed to do something they ought to do. They ought to make it perfectly clear who you are supposed to contact if you do not get redress immediately. They should do that.

I am not sure it needs to be in the legislation, but an admonition to this effect from up here might be helpful.

As to the administrative review of a denial, the Horton bill, H.R. 4960, which is being heard on the other side, contains a provision for a separate agency. We were asked to comment on that and I had to respond the way I am now, that is, on a personal or individual basis,

My reactions would be these: One, if the administrative agency simply adds one more layer of what someone has to go through to get relief, then there is a problem of simply exhausting an individual's resources before he finally gets to the courts where final relief is necessary in an intransigent case in any event.

Second, if the agency's action or the administrative action is not mandatory on the Government, where they say you must provide it, but the litigant has to go to court anyway in order to get the compulsion that he is seeking.

A third aspect is should someone like the Administrative Conference of the United States perform this function? It might be a good place to start, but I think you will have to change substantially the functions of that agency. Right now it is a body which considers problems, which discusses, which comes up with policy recommendations. Perhaps legislation ought to recognize specifically that it would be their function to set policy for certain areas of disclosure. But to have them adjudicate individual cases? I don't think that conceptually or structurally they could do that.

The members of the Conference are all extremely busy senior officials in our Government, or they are private practitioners. Since I know many of them, I know they are also very active. They could not sit in judgment. You would have to fall back on the staff itself.

They have a very slim staff. You would have to beef that up. And to have the Chairman running all of these studies that he does, presiding over the Conference sessions and, at the same time make decisions in these cases would be extremely burdensome.

Senator KENNEDY. Any ideas or views about the search and copying fees, whether we should legislate in that area?

Mr. MILLER. Recommendation 24 of the Administrative Conference of the United States contains recommendations. We would support these. If you deem it wise to put it in legislation, we would support that.

Senator KENNEDY. We will be including the Administrative Conference report and recommendations along with other materials as part of the appendix to these hearings.

We want to thank you very much, Mr. Miller, for very helpful comments and excellent recommendations.

Thank you very much.

[The statement follows:]

STATEMENT OF JOHN T. MILLER, JR., CHAIRMAN, SECTION OF  
ADMINISTRATIVE LAW OF THE AMERICAN BAR ASSOCIATION

Mr. Chairman and Members of the Subcommittee: I appreciate your invitation to appear and testify in these hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary on behalf of the Section of Administrative Law of the American Bar Association.<sup>1</sup> The Section has long been concerned with problems relating to public access to government records, and welcomes this opportunity to present its views.

In the Administrative Law Section's view, the Freedom of Information Act is serving a useful and necessary function in our society, and has generally proved to be a workable statute. For this reason, the Section believes that no sweeping changes in the structure or organization of the Act are required. Instead, the main problem with the statute today is one of enforcement, particularly at the lower levels of the government. Despite general compliance by most agencies, some problems have been encountered in receiving prompt replies to requests for agency records.

<sup>1</sup> Although we are authorized to appear on behalf of the Administrative Law Section, the policy-making body of the American Bar Association has not had an opportunity to pass on the principles of the legislation here being discussed.



The Administrative Law Section understands that the purpose of these hearings is to consider S. 1142, which was introduced in the Senate by Senator Muskie and others on March 8, 1973. Without discussing this bill in detail, I would like to devote the remainder of my statement to certain aspects of the proposed legislation which the Administrative Law Section believes merit attention at this time.

## I

First, S. 1142 makes provision for the establishment of specific time limitations intended to assure that agencies reply promptly to requests for records. (Section 1(c)). This proposal is evidently based upon the uniform regulations in implementation of the Freedom of Information Act recommended by the Administrative Conference of the United States in its Recommendation No. 24. In a statement submitted last year to the Subcommittee on Foreign Operations and Government Information of the House Committee on Government Operations, the Section strongly endorsed Recommendation No. 24, and urged that agencies should conform their internal regulations governing release of information with the uniform regulations to the maximum extent practicable, on the ground that the uniform regulations can do as much as any single measure to assure effective implementation of the Act.

The Administrative Law Section continues to believe that a set of strict time limitations for responding to requests, such as is contained in the bill before this Subcommittee, is essential to effective enforcement of the Freedom of Information Act. However, we believe that the proposal set forth in the uniform regulations proposed by the Administrative Conference in Recommendation No. 24 is far preferable to the proposal set forth in Section 1(c) of S. 1142. Both of these proposals would require that an agency comply with or deny a request in 10 working days. However, S. 1142 apparently would provide no basis for an extension of time in which to reply to a request for agency records, while Recommendation No. 24 sets forth several specific grounds for an extension of time. In our view, there are legitimate reasons for extending the time in which an agency must reply to a request, such as the need to conduct an extensive search for the records or to evaluate whether a particular record is exempt under the Information Act, and a set of time limitations should provide sufficient flexibility for extensions in such instances. Moreover, we believe that the grounds for extending the time in which to reply to a request are set forth with sufficient specificity in Recommendation No. 24 so as to avoid abuse of the provision. By failing to provide any grounds for obtaining an extension of time, S. 1142 could well tend to force the agencies to deny a request that might have been granted had more time for deliberation been allowed. Consequently, if it is determined to enact a set of time limitations, the Section recommends that the proposal set forth in Recommendation No. 24 be adopted.

## II

A second aspect of the proposed legislation which the Administrative Law Section desires to comment upon relates to provisions concerning *in camera* inspections of documents. Section 1(d) of S. 1142 contains language which is apparently intended to respond to the recent decision of the Supreme Court in *Environmental Protection Agency v. Mink*,—U.S.—, 41 L.W. 4201 (1973). In that decision, the Supreme Court ruled that, under the first exemption to the Freedom of Information Act (5 U.S.C. §552(b)(1)), a district court has no authority to inspect *in camera* a record classified in accordance with an Executive Order to separate the secret portions from the non-secret portions, and rejected "any claim that the Act intended to subject the soundness of executive security classifications to judicial review at the insistence of any objecting citizen."<sup>2</sup> The Court also held that district courts were not required, under the fifth exemption to the Act (5 U.S.C. §552(b)(5)), to inspect a record *in camera* to determine whether or not the exemption was properly claimed, but could instead rely upon affidavits, oral testimony, *etc.*, in reaching a decision. To the extent that the proposed legislation would *require* courts to examine government records *in camera* to determine whether or not they fall within a particular exemption, the Administrative Law Section opposes such propos-

<sup>2</sup> 42 L.W. 4205

als. In the Section's view, a court should be enabled to reach a decision with respect to whether or not a particular record has been lawfully withheld under the Freedom of Information Act in any manner that it chooses, including through the use of affidavits or oral testimony. However, the Section agrees that courts should be permitted to examine records *in camera* in their discretion.

It appears that the principal purpose of S. 1142 is to empower the courts to determine whether or not a particular record has been properly classified in accordance with applicable criteria governing classification in order to determine whether or not it should be withheld under the first exemption to the Freedom of Information Act. Generally speaking, the Administrative Law Section believes that courts should have the authority to review security classifications in instances where an agency has acted without reasonable grounds in assigning the classification to a particular document. To be sure the courts are not equipped to deal effectively with questions of what is desirable in the interests of national defense and foreign policy, and should be reluctant to interfere with security classifications in the absence of evidence that there are no reasonable grounds for the classification,<sup>3</sup> however, we believe that, even in this limited respect, judicial review can provide a salutary check on Executive action.

One technical difficulty with the manner in which S. 1142 attempts to provide for judicial review of security classifications is that it would not amend the language of the first exemption. Since the Supreme Court held in *Environmental Protection Agency v. Mink*, *supra*, that, under the first exemption, the sole question was whether or not the record had been classed pursuant to an Executive Order, in our view, it would be necessary to modify the language of the first exemption in order to permit a court to determine whether a record was properly classified. Because the amendment set forth in S. 1142 would not change the language of the first exemption, under the *Mink* decision, presumably a classified record would *still* be properly withheld under Section 552(b)(1) simply if it were classified pursuant to an Executive Order. While it is fairly apparent that S. 1142 envisions that judges are expected to examine classified records in order to determine whether or not they are properly classified, without amendment of Section 552(b)(1), the statute could still be construed to limit the court's role simply to deciding whether the record had been classified pursuant to an Executive Order. If the Subcommittee desires to overcome the decision of the Supreme Court in *Environmental Protection Agency v. Mink*, *supra*, it should revise the language of the first exemption in addition to requiring that classified records be examined *in camera* by a court so as to make it clear that courts have authority to review security classifications.

In view of the foregoing, the Administrative Law Section recommends that the following two sentences be substituted for the third sentence in 5 U.S.C. §552(a)(3):

"In such a case the court shall determine the matter *de novo*, with such *in camera* examination of the requested record as it finds necessary to determine if such record or any part thereof may be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. Such *in camera* examination of records which the agency claims are in the purview of subsection (b)(1) of this section is authorized whenever the court finds reasonable grounds to believe that the agency's claim is not justified."

In addition, the Section recommends that §552(b)(1) revised to read as follows: "authorized under the criteria of an Executive order to be kept secret in the interest of national defense or foreign policy."

### III

A third major portion of S. 1142 would revise certain of the exemptions set forth in Section 552(b) of the Freedom of Information Act. These include proposed amendments to the second, fourth, sixth, and seventh exemptions.

#### THE SECOND EXEMPTION

Section 2(a) of S. 1142 proposes to amend Section 552(b)(2) by inserting the word "internal personnel" immediately before "practices," and adding the

<sup>3</sup> See *Epstein v. Resor*, 421 F. 2d 390 (9th Cir. 1970), *cert. den.*, 398 U.S. 965 (1970).

words "and the disclosure of which would unduly impede the functioning of such agency" at the end of the exemption. (Section 2(a)). The Administrative Law Section agrees with the proposal to restrict the scope of the second exemption only to instances where information cannot be disclosed without nullifying the effectiveness of a particular agency function. Some courts, relying upon the Senate report for the bill subsequently enacted as the Freedom of Information Act, have held that the second exemption is limited to information pertaining to an agency's policies regarding employee vacations, lunch hour time, sick leave, parking space allocations, and similar nonsensitive matters.<sup>4</sup> Other courts, however, have accepted the broader reading of the second exemption found in the House report, which covers such matters as operating manuals and guidelines intended for the use of agency personnel.<sup>5</sup> While the Administrative Law Section does not believe that personnel information of the type described above should be withheld under the Information Act, it does believe that at least certain types of internal guidelines should be protected against public disclosure. These internal guidelines include such sensitive matters as allowable tolerances for prosecution, negotiating techniques for contracting officers, schedules of surprise audits and inspections, and similar matters which obviously cannot be disclosed without impeding the performance of the particular agency function which they concern.

In the Administrative Law Section's view, the difficulty with the proposed amendment to the second exemption set forth in S. 1142 is that the addition of the words "internal personnel" could be read to restrict unduly the scope of the exemption. In light of the Senate report discussed above, the proposed amendment could be construed to apply only to matters concerning personnel policies, and not to apply to the kinds of sensitive matters intended for the guidance of agency employees such as were described above. Accordingly, the Administrative Law Section recommends that the word "personnel" be deleted entirely from the second exemption, and that it be amended to read as follows:

"Related solely to internal rules and practices the disclosure of which would significantly impede the performance of an important agency function."

#### THE FOURTH EXEMPTION

The fourth exemption, which would be amended by Section 2(a) of S. 1142, has probably been the most controversial of all nine exemptions, in large part because of its awkward wording. As it is presently drafted, some courts have held that the fourth exemption protects only commercial and financial information that is confidential or privileged, and is not applicable to other kinds of information.<sup>6</sup> However, the Administrative Law Section believes that non-commercial and non-financial information that is confidential or privileged should be afforded the same protection as commercial and financial information. In certain types of investigations, important information is often obtained on a confidential basis which would not otherwise have been disclosed. For example, in the case of aircraft accident safety investigations, information as to the cause of the accident may be obtained only on the understanding that it will be used solely for the purpose of prevention of accidents, and will not be disclosed to the public or used for any other purpose. In addition, in our view, a citizen "must be able in confidence to complain to his Government and to provide information" without fear of reprisal.<sup>7</sup> Accordingly, the Section recommends that the fourth exemption be amended to read as follows:

"Trade secrets and privileged or confidential information obtained from any person."

The Section recognizes that such an exemption could be abused by indiscriminate receipt of information in confidence by agencies. However, this potentiality would similarly exist with respect to commercial and financial information received in confidence. It is intended that, regardless of whether or not there

<sup>4</sup> *Consumers Union v. Veterans Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969); *Benson v. GSA*, 289 F. Supp. 590 (W.D. Wash. 1968), *aff'd on other grounds*, 415 F.2d 878 (9th Cir. 1969).

<sup>5</sup> *Cunco v. McNamara*, Civ. Action No. 1826-67 (D.D.C. January 14, 1972).

<sup>6</sup> *Consumers Union v. Veterans Administration*, *supra*; *Getman v. National Labor Relations Board*, 450 F.2d 670 (D.C. Cir. 1971).

<sup>7</sup> Statement of President Lyndon B. Johnson upon signing Public Law 89-487 on July 4, 1966.



was an express or implied promise of confidentiality by the agency, the fourth exemption should be construed so as to exempt only such information as would customarily be withheld from the public and for which there is legitimate reason for non-disclosure.

#### THE SIXTH EXEMPTION

The administrative Law Section believes that certain changes also should be made in the sixth exemption. First, the word "clearly" should be deleted. In the Section's view, the sixth exemption, by requiring that information contained in "personnel and medical files and similar files" be disclosed upon request unless disclosure would constitute a "clearly unwarranted invasion of personal privacy," does not give sufficient weight to the value of personal privacy. The Section believes that deletion of the word "clearly" would provide adequate flexibility to courts to balance the interest of public disclosure against the interests of personal privacy in each case, without unduly tipping the balance in favor of disclosure.

Second, as proposed in Section 1(c) of S. 1142, the word "files" in the sixth (as well as the seventh) exemption should be changed to "records." The word "files" is sufficiently imprecise that an agency can attempt to evade compulsory disclosure simply by placing information that would otherwise be non-exempt into personnel and medical files (or investigatory files).

#### THE SEVENTH EXEMPTION

S. 1142 also proposes changes in the seventh exemption to the Freedom of Information Act, which relates to investigatory files compiled for law enforcement purposes, by expressly excluding certain specific types of records from the investigatory files exemption. (Section 2(d)). However, the Administrative Law Section believes that a better approach is to set forth explicitly the objectives which the investigatory files exemption is intended to achieve in order to assure that information is withheld only if one of those objectives would be frustrated were the information disclosed. Because many different types of information may be contained in an investigatory file for which there are legitimate reasons for non-disclosure, the Section believes that it is unwise to attempt to exclude certain types of records from the exemption under all circumstances. For example, even "scientific tests, reports, or data" (Section 2(d)) contained in an investigatory file, if released prematurely, could interfere with the prosecution of an offense or result in prejudicial publicity so as to deprive an accused of his right to a fair trial. In addition, the proposal set forth in S. 1142 would not resolve the issue as to when the investigatory files exemption terminates, an issue that has arisen in several recent court decisions.

Accordingly, the Administrative Law Section recommends that, if the seventh exemption is to be amended, it be revised to read as follows:

"Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) disclose the identity of an informer, or (D) disclose investigative techniques and procedures."

#### IV

Finally, I would like to comment upon certain miscellaneous aspects of S. 1142. First, the Administrative Law Section supports the proposal to amend 5 U.S.C. §552(a)(3) set forth in Section 1(b) regarding identification of requested records. There is some indication that the "identifiable records" provision of the Freedom of Information Act has been utilized by some agencies as a basis for denying requests for records. The proposal to revise this provision to make it clear that any request which "reasonably describes" a record is adequate for purposes of the Information Act should prevent such abuses, and is consistent with applicable court decisions. We also believe that it would also be useful to amend the statute so as to make it clear that agencies are required to separate exempt from non-exempt information in a particular record, and make available the non-exempt information.

This concludes my statement. Thank you for inviting me.

Senator KENNEDY. We will recess for about 2 minutes.

[Recess.]

Senator KENNEDY. We are delighted to have Mr. Ronald Plessner, who came from private practice in New York to become the chief freedom of information litigator for the public interest bar in Washington. He is with Public Citizen and, according to one witness Friday, is a budding Clarence Darrow, 13 wins and 2 losses in freedom of information cases.

### STATEMENT OF RONALD PLESSER, PUBLIC CITIZEN

Thank you for inviting me to testify.

Mr. PLESSER. Good morning, Senator.

As you stated I have been a staff attorney for the Center for the Study of Responsive Law for the last year or so and have been handling most of these Freedom of Information Act cases.

I would like to respond very quickly to what the Agriculture Department said this morning for two reasons. One is I think the Center should go on record on a couple of these areas, and two, I think it will help to delineate some of the problems that we are talking about.

First, Agriculture complained about the massive report requests that we and other public interest groups have made and indicated that it is almost impossible to deal with these. The requests that I am familiar with, and those basically are the meat inspection requests and civil rights documents requests, and some of the similar requests, while the result of the request was a great deal of information they were usually one-page requests and they asked for meat inspection reports for particular States.

Now, one would assume that one meat inspection report is the same as the other and if you are requesting—we were requesting categories of reports and not hundreds of different types of documents. These documents were all in the same category, in the same class. There may well have been thousands of them, but that I think only indicates the importance of the documents and the pervasiveness of the type of documents involved and why we requested them and think their disclosure is necessary.

As far as two of the cases that the representative of the Department of Agriculture referred to this morning we have a few things to say. In connection with the one on the meat inspection reports, I think a very good thing came up in the context of the conversation when the representatives of the Agriculture Department said when you asked him what would be the harm of disclosure, the meat inspection reports are public and one of the arguments that they made to us for quite a period of time was that the disclosure would inhibit the free expression of the inspectors. The disclosure of those particular reports has not resulted in such inhibitions and the Agriculture Department did not state that this morning.

It is a relevant point to indicate when we are talking about inspection reports of basic type like the meat inspection report that the disclosure does not result in any lessening of the frankness that the reporter has.

The second case that he discussed which I am interested in is the one concerned with the civil rights reports and that is presently in

litigation. I would just like to point out that it was not just for investigation reports. We were seeking audit reports which are of a more general nature, not connected with any particular investigation, and only a very small fraction of what we are seeking related at all to the testimony of witnesses which is what the representative of Agriculture this morning said was the main objection to making that information available.

The audit reports are not connected with any specific investigations. They are just indications as to whether or not the federally funded programs by the Agriculture Department are complying with title VI of the Civil Rights Act. Now, certainly that is the kind of information that the public and the Senate and the Congress are entitled to know; how the Agriculture Department is doing its job. They have refused to make that information available on the basis of investigative files which we feel is particularly misplaced.

One other quick remark concerning 18 U.S.C. Section 1905, and I do not want to beat a dead horse, but there have been at least three or four cases that have indicated that 18 U.S.C. Section 1905 is merely a penalty statute, that the substantive disclosure standards contained in the Freedom of Information Act apply and 18 U.S.C. Section 1905 merely penalizes the release of certain of that information. The representative I think very interestingly referred every time, that the Department of Agriculture would see what the harm to the agency was in considering requests. Every time he said if a request came in they would determine what the harm to the agency was. This is not only improper but illegal under the standards of the Freedom of Information Act which states that information can be withheld only if the documents are exempt under one of the specific exemptions.

I think that points out one of the problems in allowing public information people, as is proposed by some of the legislation, too much of a strong role in this area, because the job of a public information officer is to make his agency look good and if documents are to be released by him which are going to make his agency look bad, I think he is going to be a lot more hesitant than someone from the General Counsel's office or perhaps someone in a line position would be in releasing that document. The public information officer in effect is a public relations officer, even though that word has been banned by the statute, and I think it would be difficult to have a person in that function determining what kind of information should be made available.

I would like to go to my statement and just outline some of the points that I think are important.

#### IN CAMERA INSPECTION

One point that I would like to stress is *Mink v. EPA*. In his concurrence Justice Stewart stated the "Congress has built into the Freedom of Information Act an exemption that provides no means to question an Executive decision to stamp a document secret, however cynical, myopic or even corrupt that decision might have been." He goes on to say that "Congress in enacting section 552(6)(1)



chose to decree blind acceptance to Executive Fiat" and he and other justices seem to invite this body to amend the law at least as to its application to national security documents.

I think that the solution provided in the current legislation, goes a good part of the way but not all of the way. It provides for in camera inspection of documents under a claim national security. The main problem presented by the *Mink* case was not so much in camera inspection but it was the question of de novo review. The *Mink* decision really said that all the district court can determine is whether by affidavit the State Department can prove that this material was in fact classified, whether a stamp was put on it.

Now, merely to allow in camera review is not going to solve the problem. In that case Judge Hart in the lower court, indicated that what he would have done if he had in camera review would be to look at the document in camera and determine that there is a secrecy stamp on that document, and continue to keep it secret.

I think there is some need to put in a standard by which a district court judge can decide whether or not the information should be withheld.

Right now (b) (1) states if it is specifically required by Executive order the document maybe exempt from disclosure. What we would propose is that the (b) (1) section be amended to read,

This section does not apply to matters that are specifically required by Executive order to be kept secret in the interest of national defense or foreign policy and where disclosure would result in substantial harm to the national defense or foreign policy of the United States.

We think that the district court judges will be competent to decide these cases but we don't want to give them too much of a specific guideline. We think that would hamper them. They need some broad authority.

In the *Mink* case it was our understanding that a good number of the documents had nothing to do with national security. I think there was even a representation of this in the record. And most of them were just classified because of the contamination, because they were nex to national security documents and that is why they were classified. Judge Hart could not go through the file in that case and determine which was related to national security and which was not.

I think that any district court judge is competent to do that.

One extension to that is the need, as you mentioned this morning, the need of having attorneys for plaintiff participate in the in camera inspection and I think that is critical because it is a basic question of advocacy. How can I advocate my client's position if I do not know the facts in the case? And that is what happens when there is an in camera inspection and you do not have access to the documents to argue to the court.

You have to present your arguments in abstract and then hope that the judge will put them together. The function of a lawyer is to put the facts and the law together and without having participation in camera, he is severely limited.

Senator KENNEDY. Let me just see if I can understand you. You would leave it up to the court, then, to make a determination whether it really was matters which—

Mr. PLESSER. On a review basis.

Senator KENNEDY. [continuing] that fell within the classification of national security?

Mr. PLESSER. If it was properly classified, and I think certainly as a standard they would take what was in the Executive order but I think that in the *Mink* case where there were documents that had nothing to do with national security the judge would be competent to take those documents out and release them.

Senator KENNEDY. That did not relate to national security?

Mr. PLESSER. That is right.

Senator KENNEDY. Even if they were stamped with a national security stamp?

Mr. PLESSER. Yes; I think so.

The problem that we have seen——

Senator KENNEDY. Now, would you permit the plaintiff's attorney to examine all the material?

Mr. PLESSER. There is a problem—when I was talking about participation, I think I would make the same distinction or have the same problems that the ABA had this morning. In context of in camera inspections in everything except the national security areas, I think absolutely the attorney should be able to participate. I think in connection with national security matters, there is a problem. I and some members of the staff of some of the committees of Congress attended a conference this past weekend up in Boston, the American Trial Lawyers foundation, and one of the discussions, and this wasn't a final recommendation, was whether or not an attorney in this situation should have to undergo a special security clearance. The question was whether or not a district court judge would allow Mr. Kunstler access to security information, for example. There are severe problems of due process and of discrimination in determining which attorney can have access and which attorney cannot have access.

I think it can be resolved by having the district courts perhaps make some review or have some security classification. However in *Alderman v. U.S.* and in fact in the *New York Times* case, which were not Freedom of Information Act cases but where this issue was presented. In the *Alderman* case where there was national security wiretap information and in the *New York Times* case where the Pentagon Papers which the Government claimed at the time were national security documents, the Court, the Supreme Court, in both cases allowed counsel to participate in in camera review without specific security clearance. Those kinds of cases I think are far more serious at least than the kind of cases that we have had so far, and if counsel has been considered competent to participate in in camera in those cases, in the national security wire tap case, I can see no reason why the same results could not be applied with some control in this situation.

One note that I have on my paper and which I would like to stress very strongly. When Mr. Nader and I testified about a month ago in front of the Senate, we stressed this point. This is the applicability of the Freedom of Information Act to Congress and to the Executive.

We feel that the purpose of the Freedom of Information Act is to guarantee the public's right to know how the Government is protecting the public interest and we feel that the Government cannot or should not be limited to the executive agencies. To the extent that Congress has information and statistics and data which is relevant, especially the new functions of Congress vis-a-vis GAO and the factfinding capabilities of Congress, that that kind of information should be made public, and the broadening base, also White House has much more control over the operations and the White House should also be subject to the Freedom of Information Act.

One of the pervasive—

Senator KENNEDY. Just before we get off of the in camera issue, say you had a Mafia lawyer wanting to get a look at Justice Department investigative files and suing under the Freedom of Information Act. Now, there are all kinds of problems—because of informers and all the rest, how are you going to handle that situation?

Mr. PLESSER. Well, I know this is the easy way out to say let the judge decide, but I think I will take that because one of the suggestions that we make is that even in camera inspection should not be made in all instances. The judge is competent to determine whether or not he thinks in camera inspection should be made at all and we do not think that in camera should be mandated. And to the extent that the Government can show that in camera inspection, that participation by counsel would have the result, as you pointed out, in either making it a mockery because once you had the in camera inspection you in fact released the information the judge could decide not to have an inspection. I would say in most instances that I know it would be in my interest as a lawyer to keep my bar membership and be able to practice as against releasing the information. As an attorney I would take it very seriously as to whether or not I would disclose that information knowing that my ability to practice as a lawyer would be jeopardized which it would be if I disclosed the information. A Mafia lawyer would also have those problems. The real problem I think you are talking about is the identity of informers and I think as we have been seen—informers is the big bugaboo that seems to crop up in all aspects, the seventh exemptions, in camera review, and I think perhaps it would be appropriate to have some special section which says identity and information relating to specific informers can be protected in all instances.

I can recognize the specific need of protecting informers but I do not think that need can jeopardize either the right of advocacy within an in camera proceeding nor jeopardize obtaining information under the seventh exemptions.

#### DELAYS

One of the great problems that we have had in the operation of the Freedom of Information Act has been the time delay problems. Especially I have been working with the press, whenever you talk to someone in the press and say, "well, why doesn't the press use the Freedom of Information Act," invariably the reaction is time problems. They cannot spend 2, 3, 4 months, whatever it takes, processing through a request. They need a story in a week or two, but certainly they cannot wait 3 or 4 months.



I think that there is a definite need for a finite time period. Our position is that there is no need, however, for a mandatory appeal period because as the legislation now reads, there is no requirement that an agency have an appeal procedure. This is just something that has been created by administrative procedure. I do not see the necessity of having that legislated at this point.

I think that the agency, as the Federal Trade Commission now provides, they can consider the information, they make a final decision. Perhaps they need 20 days. Perhaps they need 25 days. But they make that decision and that is the final decision.

In our experience it has not been very fruitful to go back to the agency and seek an appeal. I cannot think of any situation, at least in my experience at the Center, where an appeal procedure has resulted in a significant change of agency policy. We would much rather have them consider the situation and shoot back one final letter to us, say within a 20-day period, so that we then know where we stand and we don't have to go back again and write another appeal letter.

I know the criticism of that suggestion is that, we have the ability to take these cases to court and for our functions litigation is better than administrative remedies. But I do not think that my suggestion would preclude the possibility of someone going back and asking for reevaluation or going back to an agency and trying to explain their position.

All my suggestion would do would be allow you to go to court after your agency's first decision. As I pointed out, that is presently the regulations and policies of the Federal Trade Commission and that system while still working out some problems can function very well.

If this committee feels that time limitation on the initial and the appeal period should be instituted, you should have perhaps more time for the initial response because that is a problem of gathering information and determining, as the gentleman from Agriculture said, determining really what the request was, what you have in the files. That takes the time.

It seems to me that the policy decision whether or not the information should be disclosed does not take the time, and this morning I think your question to the person in Agriculture was how long does it take on appeal and he said other than in routine cases, 40 or 50 days. He tried to justify that on the basis of the time it took to get all the information together.

Well, all that information should have been brought together in the initial request. All the appeal should do is to have a higher person in the agency review what a lower person in the agency has already decided, and that should not take, it seems to me, more than ten days and certainly should not take a longer time than the initial review.

I would like to comment——

Senator KENNEDY. How arbitrary has the extension of time been by various agencies that you have been dealing with?

Mr. PLESSER. We have some examples set forth in our testimony. When Mr. Nader and I testified a month ago we set forth some additional examples.

I feel it is pretty arbitrary. With some exceptions I cannot recall when it has taken us—in less than 30 days on both the initial and the final request to get a substantive response.

One example that we cited was with the Department of Justice itself where we requested documents concerning the business review procedure. Now, these are letters between corporations and the Anti-trust Division concerning no action letters. They have no enforcement intent concerning an antitrust undertaking that this company might take, in effect telling the companies that they can go ahead and that they won't have any antitrust enforcement taken against them.

There has been a policy of confidentiality for those documents for many years. They have never been made public. We requested them. It took about a month or two to get initial denial—no, it took 3 months to get the initial denial and it took another 3 months to get the final denial on appeal, and that is not—where there was in fact a regulation which indicated the information was exempt, even with that we had to go through the administrative procedures requesting it and it took us 6 months when the policy at Justice Department as far as I was concerned was crystal clear, that that information was not available and that we would have to challenge it in court. So I think that there have been some great instances where the time delay has been arbitrary.

#### APPEALS TO OUTSIDE AGENCY

I would like to comment briefly on the concept of creating an outside agency to handle appeals. First, I would like to talk just briefly about Representative Horton's idea of a commission which would allow a third review of requests. If you were denied by an agency you would go to this commission. The only remedy that Representative Horton's commission would have would be to write in effect an opinion letter which would say the information should be available or not available. Then you can go to court and you supposedly can present that opinion letter to the district court judge.

I do not really see the force or need or necessity of that kind of commission because it really has no affirmative power. The kind of agency that I think that you suggested this morning or during these hearings, would be appropriate. However, I think there is a danger if you take the appeal procedure away from a particular agency of taking the heat off of that agency. If we make a request to Agriculture and Agriculture responds, then we can go to court or we can talk in a congressional context or we can perhaps have a story in the newspapers about whether or not Agriculture was responsive we find in the public interest field that that kind of pressure without going to court sometimes is very effective.

If you could pinpoint the agency and if you can pinpoint the problems of the agency in not being responsive reforms can occur.

If you give a body such as the Administrative Conference the appeal authority, you put them up, it seems to me, as the fall guy in Government who is the bad guy and you take that pressure away from the substantive agencies, I think the tendency will be, to deny information in the agency and if the Administrative Conference wants to release the information.

One comment on the Administrative Conference. I just have a lot of questions and I think ABA said it very well this morning because the people on the Commission, first, to a large extent are Federal employees and I do not know how appropriate it is to have agency employees reviewing agency decisions.

Second, the Administrative Conference historically has been just really an advisory type panel, and how it would react to being given now affirmative duties is unclear.

I think perhaps some thought could be given to another agency or perhaps something more along the line of, well, an ombudsman, or the Consumer Protection Agency concept to have this function and not the Administrative Conference.

One suggestion that I would have is that there is a need for oversight in this area. There is a need both for congressional oversight and for an agency oversight. As we pointed out in a lot of our written testimony, the Department of Justice and OMB have just abdicated their authority with value. There are different regulations for different agencies. The case law that is established is not followed. Agencies go on forever until you can challenge them one at a time in a court very often before they will change their regulations.

We feel there is a need for some kind of agency—some kind of representative to force agencies to update their regulations and to educate them on what the current State of law is.

The Justice Department now relies on a memorandum that was written in 1967 and 1968 to inform its clients as to the State of the law concerning the Freedom of Information Act. That seems to me a terrible failure. There have been 20 or 30 decided cases since that time which have substantially changed and interpreted the meaning of the statute, and the Department of Justice still relies upon its old 1967 interpretation.

Senator KENNEDY. Who should do it? Shouldn't the Justice Department do it?

Mr. PLESSER. Well, I think the Justice Department should do it.

One of the problems that I found just personally dealing with the Justice Department is that the Office of Legal Counsel whose responsibility it is to advise the Government agencies on what the State of the law is seems to take an attorney-client position with their agencies. In other words, they will try to provide advice to the agencies not as to the State of the law but as to what the agency wants as though they were consulting a private client. I think perhaps that is appropriate for the general litigation divisions of Justice but not for the Office of Legal Counsel. If the Office of Legal Counsel cannot do this job adequately, then I think perhaps some other agency should because there is a need for that.

Senator KENNEDY. Well, you would probably leave it within the Justice Department, the Office of Legal Counsel.

Mr. PLESSER. Leave the Office of Legal Counsel as currently constituted in the Justice Department, yes.

If there should be another agency or another facility to oversee the activities of the Freedom of Information Act, I think that is a different question. Perhaps there is need for that.

I would just again briefly like to comment on the fifth exemption and on fees and then be open to questions.



## INTERNAL MEMORANDA

The fifth exemption, which pertains to the interagency letters and memoranda, is the one exemption that has obviously given us and I think the public and the press the most problems and I think it is very difficult to talk in terms of being able to write new language for the fifth exemption. Some consideration should be made as to whether or not the fifth exemption is consistent with the purposes of the Freedom of Information Act or what the purposes of the Freedom of Information Act should be, namely, public access to government information. There is a great deal of validity to the concept that the fifth exemption should be eliminated and that the public should have full access to the whole process of making a decision in the government and not be eliminated from all levels of that process making until the final policies have been made public and then at that point only **knowing what the final policy was** and not being able to get access to any of the underlying information.

I think the SST controversy was a beautiful case in point. There was this document that the President relied on in making his policy decision on the SST and it was a final product of many experts in the field evaluating the facts and policy considerations. That information was attempted to be kept secret by the Executive and I think that is exactly the type of information which the public need to have access to if they are going to know how the government is functioning.

As far as fees are concerned, I think legal fees—

Senator KENNEDY. Now, how do you meet the points that were talked about earlier this morning, about the protection of individuals, as we heard—a meat inspector or the person who has the complaints against the steamship companies say or the private going to the inspector general, or whatever? Or do you feel that the public interest is so compelling that we ought to just say that we will take our chances and just call them as we see them and let these people make their complaints or not make them?

Mr. PLESSER. Well, as far as the internal communications, I take that position. As far as—I think if we are talking about informers or information which is legitimately a trade secret or commercial information or invasions of personal privacy, I think those kinds of matters should be protected. I am not standing here and saying we should have a law that in all instances any information the government has should be made public. I do not believe that. But I believe that when the sole reason for withholding the information is that it is an internal document, that it was within the agency, that is not a valid reason in keeping with an open government. The more you allow secrecy concerning internal communications, the more you operate the government in secret. And I think that it would be very worthwhile to eliminate the fifth exemption.

My difficulty in stating that is that I really do not see how it can effectively be amended by changing language. To change language is going to create problems and I think that either a policy decision can be made either to accept the law as it stands now or to eliminate it completely and I think parsing the statute or playing with the

statute is not going to be effective for the purposes that I am interested in.

Just one last point on that. I think there has been—we have heard time and time and time again that disclosure of internal memoranda will be harmful to the operations of the government. We have yet to see any empirical data or examples of where that would be the case. I think in Florida where they have aggressive open meeting laws and every meeting is a public meeting no matter what the purpose of discussion, with some limitations about personal privacy investigation and the like. But certainly any kind of internal discussions are public—are open to public access and I think as Senator Chiles has indicated in a lot of materials that his office has prepared, this has a good effect on the State of Florida. It has not harmed it or made it impossible to operate as is claimed by the government administrators that have testified both in front of this committee and in the House over the past couple of years.

#### FEEs

Senator KENNEDY. Is there anything you want to say about the fees?

Mr. PLESSER. Well, other than I think that the main problem with the Freedom of Information Act is that one remedy is court action and there is no financial gain to be obtained by anybody in normal circumstances by bringing a Freedom of Information Act case. Therefore, to have to pay \$1,500 in legal fees is very often a very strong barrier for people in the general public and for reporters to use the act.

I think, No. 1, it is very important to have legal fees so that if someone in this situation seeks redress, they can get their legal fees back so that they can use the act.

One question as to whether or not Grumman Aircraft or Bristol-Myers Corp. should be able to use fees. I think I would agree with a lot of what the ABA said this morning, that to a certain extent it does operate as a penalty, and second, I think that the judge as in all of these types of remedies can make considerations as to what a legitimate legal fee would be. I think one of the problems with Bristol-Myers is that if Bristol-Myers, and I only use them because they brought cases, their legal fees are most probably considerably higher than if a private individual would bring one of these cases, just by the nature and type of litigation, the way you litigate a case if you are representing a major corporation as against when you are representing an individual. I think that would be taken into account. But if a corporation brought a case I do not think it should be necessarily be that under no consideration should they receive legal fees. Like in antitrust cases, where legal fees are assigned I think to a certain extent both to encourage people to use it and also as a further penalty.

#### COMMINGLING

Senator KENNEDY. Have you found evidence of the commingling of public records with exempt files so that agencies use that as an excuse to not reveal information?

Mr. PLESSER. Well, the *Mink* case indicates that as concerning national security. How the commingling problem creates problems for us, is not so much that they refuse to make the whole file available, let's say. They say will go through and take out what is exempt from what is not exempt and that is what the Agriculture Department said here, but they want to charge us \$91,000 for separating after they have commingled. That is a severe problem to access because they do not exempt the entire record but they say, well, if you want the nonexempt material that is commingled with the exempt material, we are going to have to put a high level staff person on the job to go through this material and separate it and that will cost you \$91,000. That is what the Department of Agriculture did.

I think that there should be some responsibility—I do not know how it can be done legislatively, but in the initial decisions in how to treat information and how to make it available and how to file it that the access, public information access, should be taken into consideration. I think if Agriculture would have set up their files in such a way that that information would not have been commingled then there would have been no problems. They would have just said, these are the file drawers and made it available and kept the secret information separate.

Senator KENNEDY. How do you reach the sort of inherent problem that must exist in any of the agencies of the desire to make as little information available as possible—the narrow self-interest consideration which I think is probably pretty general among most agencies? How do we handle that? Do you believe it is a problem and is there anything that can be done legislatively to deal with it?

Mr. PLESSER. No. 1, I think it is a problem. The solution to it I think is accountability, one, the way the Senator has suggested in having the person responsible for withholding the information publicly known. I think more litigation in this area is encouraged by having legal fees assigned and having procedures cut down, more lawsuits filed, the more they lose and as I think was a clear indication from the Department of Agriculture this morning, the looser the information policies become.

I know I had the experience myself when one of our staff people asks for information, very often they are just refused the information and kind of laughed at. We are not going to give you that kind of information. But if I call them and then lay out the law and what I think the rules are, if we write them a letter and we make them stand up to the regulations and to the law, very often we see the information becoming available. So I think that the solution to that problem is allowing litigation to be a much more usable tool and I think congressional oversight will be effective. I think the Moorhead committee in their oversight activities have been very effective in getting the information and then calling people in when a problem has been brought to them. It is exposure that solves the problem.

Senator KENNEDY. Thank you very very much for your very helpful statement and comments. It is useful to have someone who has been on the firing line who can bring that special, practical dimension which you have done so well this morning.



Mr. PLESSER. Thank you.  
[The statement follows:]

#### TESTIMONY OF RONALD L. PLESSER

Mr. Chairman, distinguished members of the Subcommittee on Administrative Practices and Procedures, thank you for inviting me to present my views on the Freedom of Information Act and the various proposed amendments to that Act, S. 1142, which are pending in front of this committee.

I am a staff attorney with the Center for Study of Responsive Law and have spent 100% of my time over the past year on the Freedom of Information Act. I have filed during that period on behalf of various clients over 15 Freedom of Information Act law suits. This is in addition to my being counsel on appeal and counsel for *amicus curiae* in various other cases. I have also worked with the press and various public interest groups concerning the Freedom of Information Act. From my vantage point the Act works, but just barely.

Before I discuss the problems of the operation of the Freedom of Information Act I would like to relate some instances where after litigating extensively, we and other individuals have received documents which the administration has contended were in suit. These are nursing home reports, meat inspection reports and civil rights compliance reports, as well as many others. Hardly the stuff from which secrets are made. I represented Peter Schuck in an action to obtain meat inspection reports compiled by the Department of Agriculture on intra state plants. We were denied access all through the administrative level and then we filed suit. The District Court made these documents available and the USDA did not appeal. The USDA contended that these meat inspection reports were internal memoranda exempt under the fifth exemption and were investigative reports exempt under the seventh exemption. After contesting the USDA for a year we finally received access to the documents. They were a graded check list of the plants in each state. They clearly were not deliberative policy making documents. Their disclosure did not have the ill effects that is generally claimed by the government. Public disclosure of the type of documents which we generally seek are fought bitterly by the government, but once the documents are disclosed we can see no adverse effect on the operation of agencies.

I also want to discuss the basic scope of the Freedom of Information Act. The Act applies only to executive branch agencies and departments and excludes the Congress. The Library of Congress and the General Accounting Office and the Cost Accounting Standards Board, all agencies of Congress, consider themselves exempted from the Act. The GAO, as well as various committees of Congress, undertake substantive investigations in which facts are gathered and information obtained. If we are to have openness in government, then all government should be open to public access. The GAO and the Congress function in much the same way as some agencies do, but unlike such agencies the GAO and some of the activities of the committees are closed to public scrutiny. Congress serves an important role in government and the law which guarantees public access to government should not exclude Congress.

The Freedom of Information Act was passed to guarantee the public's right to know how the government is protecting the public interest. The public certainly has an equal if not a greater right in relation to Congress to know how its elected officials are performing their jobs in order that they can make more informed decisions at election time and influence them between election time.

There are three primary problem areas which severely limit the effective operation of the Freedom of Information Act. The first are the issues of inspection presented by the Supreme Court decision in *Mink v. Environmental Protection Agency*, 41 U.S.L.W. 4201 (decided January 1973). The second concerns the procedural loopholes of the Freedom of Information Act. The third area impeding the effective operation of the Act is that of certain of the substantive exemptions.

The ramifications of the Supreme Court decision in *Mink v. Environmental Protection Agency* make it imperative that the intentions of Congress be clarified. The Supreme Court denied Congresswoman Mink and 32 other members of Congress access to certain documents pertaining to the testing of nuclear

weapons on Amchitka Island in November 1971. The government contended that certain of these files were classified for reasons of national defense and foreign policy. The District Court refused to examine the requested documents *in camera* and determine if they in fact were documents that were qualified to be classified pursuant to executive order, as required by the first exemption to the Freedom of Information Act. The District Court refused to determine whether or not there were included with or attached to the documents which may have been properly classified, documents which were not properly classified.<sup>1</sup> The Court of Appeals held that in order to conduct a *de novo* review, the District Court must review *in camera* the documents claimed to be classified. The Supreme Court reversed and held that the first exemption of the Freedom of Information Act only requires that in order to exempt documents, the government merely has to prove that the documents sought were in fact classified pursuant to executive order. As long as that is done, the District Court judge cannot look any further. In his concurrence, Justice Stewart stated that Congress "... has built into the Freedom of Information Act an exemption that provides no means to question an Executive decision to stamp a document 'secret,' however cynical, myopic, or even corrupt that decision might have been. He goes on to say that Congress, "in enacting section 552(b) (1) chose ... to decree blind acceptance of Executive fiat.

The practical effect of the *Mink* decision has been and will be in the future, if not changed by legislation, to completely eliminate from the parameter of the Freedom of Information Act any document which could remotely be considered relevant to foreign policy or national defense. All an agency has to do is have an official certify that the documents are classified pursuant to executive order. Neither the courts nor Congress can review that decision. In effect, the court has created a blanket, litigation-proof exemption to the Freedom of Information Act. This cannot have been the intention of Congress when it passed the Freedom of Information Act, and it should not be the intent of Congress now.

The principal problem of the *Mink* decision is no *in camera* inspection of documents, but *de novo* review by the District Court. I do not think that it is necessary in all cases to have *in camera* review. The language of section 1.(d) seems to indicate that at least in cases relative to the first exemption, the District Court Judge must conduct *in camera* review. That is unnecessary. What is necessary is to restore to the District Court the same *de novo* review power that it has when dealing with the other eight exemptions. The language of the statute should, however, make it clear that the District Court may use any method ordinarily available to it including *in camera* inspection in conducting its *de novo* review.

Section 1.(d) (1) of S.1142 provides that The court shall determine the matter *de novo* including by examination of the contents of any agency records *in camera* to determine if such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) and the burden is on the agency to sustain its action. This in effect places a substantive standard on how the District Court Judge is to treat documents claimed to be classified. Section 1.(d) (1) should be made to apply the principle of *de novo* review to all exemptions and mandate that *in camera* inspection be made where appropriate. The substantive test contained in section 1.(d) (2) should replace the exemption as it presently reads. That section should read:

(b) This section does not apply to matters that are specifically required by Executive order to be kept secret in the interest of national defense or foreign policy and where disclosure would result in substantial harm to the national defense or foreign policy of the United States.

By structuring the amendments in this way, the District Court judge must look behind the classification process of the executive and be able on a document-by-document basis to determine whether or not a particular document should be available or should be withheld from public disclosure.

In spite of the fact that decisions obtained from courts have been overwhelmingly favorable to the plaintiffs seeking access to information, the Act

<sup>1</sup>In my experience in cases of litigation where the fact of classification has been in dispute, the District Court judge has indicated problems in ordering of a review of whether or not classification was done in accordance with executive order.

has been severely crippled by the procedural loopholes. In the period from July 4, 1967, to July 4, 1971, the House Subcommittee on Foreign Operations and Government Information reported that 99 cases were brought in court and the government's refusal to grant access was sustained in only 23 cases.<sup>2</sup> Our experience strongly reaffirms this. We have initiated more than 25 cases, of which approximately 10 are pending. Of that number the District Court has sustained the government's withholding of information in only 2 cases, and one of those two is presently pending in the Court of Appeals for the District of Columbia. It is clear that when challenged, in the majority of cases the agencies have been unable to sustain their policies of secrecy. Much of what is wrong with the Act is its procedural loopholes that allow government agencies and employees of those agencies to flout it with impunity.

First, above all else, time delay and the frequent need to use agency appeal procedures make the public's right to know, as established by the Freedom of Information Act, a hollow right. If a citizen or a member of the press wants to obtain information from an agency, he must first request that information in writing. If he is lucky and has sent his request to the correct office, he might get a response in no less than a month. Once he has received an initial denial, he must again write the agency and appeal the denial of his information. He then must wait another month or two before he receives his final denial. Only then has he exhausted his administrative remedies and can he seek judicial relief. And despite the expedited procedures in the Act, this too may mean delay and appeals.

In August of 1972 two of my colleagues requested access to the business review procedures of the Antitrust Division of the Department of Justice. This request of August 26, 1972, was not answered until November 24, 1972, when Deputy Attorney General Ralph Erickson denied all but a small portion of their request. They were forced by agency procedure to appeal this denial to the Attorney General and they did so on December 6, 1972. They did not receive a response from the Attorney General and consequently filed suit under the Freedom of Information Act on February 21, 1973, some six months after their initial request. Finally, on April 18, 1973 they received a final denial from the Department of Justice. The information that they sought was a clearly identifiable set of records—correspondence between the Antitrust Division and companies seeking merger clearance under the antitrust laws. These have always been treated as confidential by the Antitrust Division. No unique legal argument or difficult, factual, evaluation was involved. There was a pre-existing policy to withhold this information from the public, but it has taken 6 months for them to receive a final denial, an assumed, technical prerequisite to a law suit. Other examples abound, and it is our best guess that it takes in most instances three to four months before an agency finally acts on a request.

In most cases, but especially with the press, it is crucial that information is timely obtained. Information is needed usually for a particular purpose, and a delay of three months before you are even denied the information often defeats the purpose of requesting the information in the first place. Agencies are all too aware of this and delay is often used as a way to discourage information requests. Even though the press was a major force behind the passage of the Freedom of Information Act, it has steadfastly refused to use it. Of the 150-200 cases that have been filed under the Act, only four have been brought by newspapers or individual reports. The primary reason is the time it takes to get information. A story may be able to hold a week, maybe even a month, but rarely three or six months.

It is crucial that the agencies be mandated to respond within a finite period of time. Section 1(c) of S. 1142 provides that the agencies must make a determination within 10 days to an initial request and make a final determination 20 days after an appeal has been filed. This solves only half the problem. It has been my experience with dozens of cases that the administrative appeal process is no more than a rubber stamp. I can recall no instance where an agency decision has been substantially changed on appeal. The appeal process is not presently mandated by statute but is, with certain exceptions, current procedure in every agency. It would be appropriate for the Congress to elimi-

<sup>2</sup> Hearings, U.S. Government Information Policies and Practices — Administration and Operation of the Freedom of Information Act (Part 4). House Subcommittee on Foreign Operations & Government Information, March 6, 7, 10, 14, & 16 1972, p. 1338.



nate the appeal procedure entirely and mandate that an initial agency denial is to be deemed a final determination. The agency should also be required to make that response within a finite period of time. Ten to twenty days would not in my experience be unreasonable.

If appeals are allowed to remain an agency procedure, 20 days is an unreasonably long period of time for a response from an agency. The time allowed on appeal in no event should exceed 10 days.

Another related problem with the operation of the Freedom of Information Act is the time that it takes for an information case to proceed through the District Court. A survey presented to the House Subcommittee on Foreign Operations and Government Information<sup>3</sup> of the dockets of the United States District Court for the District of Columbia conducted by William Dobrovir, a Washington attorney, indicates that the average time it takes for a case to reach a final determination in that court is 294 days. It should be noted that that figure includes the 16 days that the court took in *Mink v. Environmental Protection Agency*, which received accelerated treatment. In most cases, in our experience, the period it takes the court to decide a case is over one year. This occurs even though the Freedom of Information Act states that cases brought under it are to receive preference on the docket and are to be expedited in every way. A major reason for this excessive period of time is that as generally provided by the Federal Rules of Civil Procedure, the government has 60 days to answer a complaint for all litigation where the government is the defendant. The Federal Rules allow private parties only 20 days. It has been my experience that almost without exception the government asks for additional time beyond 60 days. In many cases 70 to 90 days or more have passed before a responsive pleading is filed. The 60 days that the government has to answer is perhaps defensible in other federal litigation, but it is not in Freedom of Information litigation. When the agency has finally denied access to the information at the administrative level, it has determined what its factual and legal position is. The 60 days does no more than unnecessarily further extend the time it takes for the public's right to information to be resolved. S. 1142 provides that the government respond within 20 days to a complaint. The adoption of this provision is needed if the Freedom of Information Act is to be effective.

S. 1142 provides that a successful plaintiff in a Freedom of Information action may recover reasonable attorney fees and other litigation costs in a case brought under the Act. Figures prepared by the House Subcommittee on Foreign Operations and Government Information indicate that half of the cases that have been brought have been brought by private industry. Very few cases have been brought by individuals. The reason is cost. Even the simplest of Freedom of Information cases will incur legal expenses well in excess of \$1,000. This is hardly conducive to the private individual or public interest group that needs the information but will receive no financial gain as a result of obtaining it. Successful litigants should be able to recover the cost of exerting their right to obtain information. This is especially important because of the large number of cases that the government loses in court. If the government had to pay legal fees each time it lost a case, it would be much more careful to oppose only those cases that it had a strong chance of winning. It is proper, however, for the authority to assess fees and costs to be at the discretion of the Federal District judge handling the action.

S. 1142 also states that attorney fees may be assessed where the government has not prevailed. Since there are many cases where some information is released and some is not, that language should be changed to has not substantially prevailed. Then even if the government may be successful in a limited part of the case, the plaintiff would still be able to receive reasonable attorney fees.

One of the major roadblocks to the effectiveness of the FOI Act has been the almost total lack of government leadership in the operation and performance of the Act. The Justice Department and the Office of Management and Budget have done almost nothing to ensure uniform compliance with the Act. One of the major problems of citizen access to information has been the cost of access. The Department of Agriculture requested the prepayment of \$85,000 in one instance and \$91,840 in another for access to documents. These and

<sup>3</sup> House Hearings, *supra*, part 5, p. 1398.

other instances were too much even for the OMB, and in one of their few directives under the Freedom of Information Act, then Director of OMB, George Shultz directed on May 2, 1972, that the fees should not be established at an excessive level for the purpose of deterring requests for copies of records. He stated that fees should not exceed the actual costs of the services provided and that all agencies report back to him no later than July 1 of that year. Months passed and in January of 1973 OMB reported to the staff of the House Subcommittee on Foreign Operations and Government Information that it (OMB) would not enforce this earlier directive and would permit agencies to charge what they wanted. OMB had taken a lone forward step but then fell back and has allowed agencies to maintain policies which even OMB admits deter access.

The Department of Justice has established an *ad hoc* committee to review final agency denials of requests for documents. This was established in 1969 to reduce the number of frivolous and losing cases that wind up in court. The government has not been winning any greater a percentage of cases since the inception of this committee. The Committee also does not advise agencies on a formal basis of recent developments in case law. The Department of Justice in 1967 issued an Attorney General's Memorandum on agency implementation of the Act. There have been numerous court decisions since that publication, but the Department has not seen fit to revise its Memorandum and inform its clients of the current state of law under the Freedom of Information Act.

The agencies have been left to themselves without any government-wide guidance, and they have failed to comply with the letter and intent of the Act. Even when the courts have declared that certain types of information must be public in one agency, that agency or other agencies have refused to implement the policy set forth in the court's decision. The agencies have refused to adopt as precedent the law that has been adopted by the courts. Three separate courts, one court of appeals and two separate district courts have conclusively held that administrative staff manuals such as IRS agents' handbooks and Occupational Health and Safety Administration inspectors' manuals were to be made public.<sup>4</sup> The Federal Trade Commission, after these cases were decided, promulgated new regulations which state that administrative staff manuals are to be kept confidential. When questioned, the Federal Trade Commission general counsel's office said that it was aware of the three cases but would not change its policy merely on that basis. This is a theme consistent throughout the government an agency will comply only either when it serves its purposes or when it is actually facing litigation or a court decision. An even more striking example of this was the case of *Schechter v. Richardson*, which was brought in the District of Columbia District Court. Malvin Schechter, editor of Hospital Practice magazine, sought access to and obtained eight nursing home inspection reports from the Social Security Administration as the result of court action. The government did not appeal the case, but when Mr. Schechter approached the Social Security Administration for additional documents of an identical nature, the answer was again no, and Mr. Schechter had to go to court again.

Federal government agencies unanimously opposed the passage of the Freedom of Information Act seven years ago, and they have been successful in making this Act an almost meaningless statute. It is obvious that strong leadership must be exerted if the agencies are to comply not only with the letter but also the spirit of the Act. S. 1142 would require that each agency shall submit an annual report concerning its activities and performance under the Freedom of Information Act to Congress. This reporting requirement is a necessary and useful addition to the Act. However, it will only be important if the responsible committees assert some meaningful leadership and guidance in this field. The agencies have ignored the Act to a large extent and they must be made accountable to Congress for their actions.

A great failure of the Freedom of Information Act has been that it does not hold federal officials accountable for not disclosing information. As presently written, the criminal code, 18 U.S.C. § 1905, makes a federal official criminally liable if he releases trade secret or commercially valuable information. The

<sup>4</sup> *Hawkes v. IRS*, 467 F.2d 787 (6th Cir. 1972); *Stokes v. Hodgson*, 347 F. Supp. 371 (N.D. Ga. 1972); *Long v. IRS*, F. Supp. (N.D. Wash. 1972). The *Stokes* case has been recently affirmed by the Fifth Circuit Court of Appeals as *Stokes v. Brennan* (Decided April 3, 1973).

new criminal code proposed by Senator McClellan, S. 1, section 2-6F1, proposes to hold a federal employee criminally liable if in violation of his obligation as a public servant under a statute or rule, regulation or order under such statute, he (federal employee) knowingly discloses any information which he has acquired as a public servant . . . . There are no corresponding penalties for a federal employee if he illegally refuses to *grant* access to documents in violation of his obligation to a public servant under the Freedom of Information Act. The natural tendency of a federal employee faced with criminal penalties if he incorrectly withholds is to keep the requested documents or records secret. The employee who incorrectly withholds information must be held personally accountable and be liable for penalties. It would be appropriate to have sanctions such as mandatory suspension or termination of federal employment in certain circumstances where actual harm has resulted to have criminal penalties applied.

If the government can suspend or terminate an individual for releasing information, then it must be compelled to bring similar action against an employee for not disclosing public information. Only after federal employees are held accountable for their acts under this law will the people's right to know be guaranteed.

The substantive exemptions have mainly caused problems because of agency refusal to adhere to the spirit of the Freedom of Information Act. The exemptions have been interpreted in their broadest sense and have been used as a blanket excuse to withhold information. As I stated before, the courts have done a good job in interpreting the Act and have generally followed the apparent intentions of Congress.

However, I would like to specifically comment on the fifth exemption since this is the exemption that seems to cause the most difficulty. The fifth exemption excludes from disclosure "inter-agency or intra-agency memorandums. ((sic)) On the basis of the fifth exemption, information has been denied by government agencies in 75 to 80 percent of my cases. The public has been denied access to legitimate kinds of information such as inspection reports, nursing home reports, and civil service personnel management evaluation reports because the agencies have determined that they are internal.

If the Act is intended to guarantee the people's right to know how the government is discharging its duty to protect the public interest,"<sup>5</sup> then the fifth exemption should be severely limited or completely eliminated from the Act. When internal documents are allowed to be kept secret, we find out what the government has done after a policy has been adopted. What is needed is the right to go behind those final policy decisions and examine the facts and basis of those decisions.

The courts have uniformly held that any factual information which is not inextricably intertwined with policy-making and opinions in the deliberative process of the government must be disclosed. However, this is not always possible and material is more often than not, inextricably intertwined. Therefore, I think it almost impossible to effectively amend the fifth by a change in the language. Only by elimination of the fifth can the intended meaning of the Freedom of Information Act be properly safeguarded.

Senator KENNEDY. The subcommittee will stand in recess until June 26 when we will hear the Attorney General.

[Whereupon, at 12:15 p.m., the subcommittee recessed to reconvene on June 26, 1973.]

[The following additional statements and correspondence were submitted for the record.]

STATEMENT OF JACK L. BRADLEY, PRESIDENT, NATIONAL PRESS  
PHOTOGRAPHERS ASSOCIATION

Some of the provisions of Senate Bill 1400, President Nixon's proposed "Criminal Code Reform Act of 1973," are so sweeping that they simply must be amended.

If the bill is made into law as proposed, it would be entirely possible that a photographer could be sent to jail for taking pictures in an Army mess hall!

<sup>5</sup> *Wellford v. Hardin*, 444 F.2d 21, 24 (4th Cir. 1971).



That may be hard to believe, but we believe it, based on our reading of sections of the bill singled out by Senator Edmund Muskie.

The key provision which bothers us is one which reads: "A person is guilty of an offense if he knowingly communicates information relating to the national defense to a person not authorized to receive it."

The bill defines "information relating to the national defense" to include "military installations of the United States"—and that includes mess halls.

We can not imagine that it is the intention of the Nixon administration to put all our military bases off-limits to reporters and photographers, but that would seem to be possible the way the bill is written.

At the very least, it needs to be re-written in such a fashion to make it plain that the only type of information which shouldn't be shouted from the housetops is that which has a clear and direct impact on our national security.

Senator Muskie, of course, says we already have plenty of laws to protect the nation from the disclosure of information which would really be harmful to security, and we're inclined to agree with him in view of the harassment of the press which has been going on ever since President Nixon was elected.

But that is not the issue. Senate Bill 1400 is an effort to reform or make better sense out of the whole criminal code and it is proper that sections dealing with the improper disclosure of classified information be up-dated along with everything else.

But up-dating or re-codifying should not be used as a device to significantly change the laws which exist. And certainly the bill oversteps itself in respect to the impact the section we mentioned would have on the press.

The Joint Media Committee on which I serve is aware of the problem and I feel certain that the problem will be cleaned up. It would be nonsense to think otherwise.

However, I must say that it makes me a little bit sick at my stomach to see that the drafters of Senate Bill 1400 would have the gall to send such ridiculous provisions to the Congress.

Neither I nor Senator Muskie should have to bother to make an issue of this sort of thing. It should not even have come up and I don't think it would have if President Nixon himself had known what was going on.

I cannot believe that Nixon himself would defend the particular provision. Somebody just goofed and Nixon must have been too busy worrying about other things to notice it.

But Attorney General Kleindienst should have noticed it and he should have straightened it out. If he doesn't do so pretty quickly, we are going to lose all respect for not only the administration's attitude toward the press but also its comprehension of the law itself.

I am not yet ready to believe, as some of my colleagues in some quarters of the press say they do, that the Nixon administration is really trying to destroy the free flow of information in our democracy. But I must say that certain provisions of this bill shake my faith somewhat.

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THE FEDERAL BAR ASSOCIATION.  
Washington, D.C., June 27, 1973.

Re: S.1142.

Hon. EDWARD M. KENNEDY,

*Chairman, Subcommittee on Administrative Practice and Procedure,  
Committee on the Judiciary,  
Senate Office Building,  
Washington, D.C.*

DEAR MR. CHAIRMAN: In response to your letter of June 4, 1973, I enclose a copy of a letter to Congressman Moorehead summarizing the responses received from the members of the Committee on Administrative Law and Procedure of the Federal Bar Association with respect to his bill, H.R. 5245, which I understand is identical to S. 1142.

I hope this will be helpful to you and your Subcommittee.

Respectfully,

WILLIAM L. ELLIS, *Chairman.*

Enclosure.

THE FEDERAL BAR ASSOCIATION,  
Washington, D.C., June 27, 1973.

Re: H.R. 5245.

Hon. WILLIAM S. MOORHEAD,

*Chairman, Subcommittee on Foreign Operations and Freedom of Information,  
Committee on Government Operations  
Rayburn House Office Building  
Washington, D.C.*

DEAR MR. CHAIRMAN: The Committee on Administrative Law and Procedure of the Federal Bar Association has been polled by mail on short notice seeking comments on the amendments to the Freedom of Information Act proposed by H.R. 5245. This letter summarizes the responses for the record of your Subcommittee's hearings on the bill.

Five members endorsed the amendments proposed by H.R. 5245 or its thrust without reservations.

Two members expressed concern about the proposed amendment to Section 522(b) (4) for fear that information supplied to the Government in confidence might be disclosed.

One of these members drew attention to the language proposed by Mr. Wolf of the Georgetown University Law Center's Institute for Public Interest Representation that Subsection (4) be amended to exempt "trade secrets and confidential commercial information obtained from a person, where disclosure of such information would place a person at a clearly unwarranted commercial disadvantage." The same member suggested providing by statute "for the person who has provided the information rather than the Government, to play the crucial role in asserting its confidential nature in the face of a demand from the third party". Finally, the same member suggested a provision for waiver of confidentiality by the person who supplied the information.

One member opposed any provision "which would require the Government to pay reasonable attorney fees and other litigation costs of citizens bringing an action against the United States".

One member expressed the view that the proposals to require that agencies (1) "publicize and distribute" rather than "maintain" indexes, (2) respond to requests with ten days and (3) report requests and dispositions would be burdensome, expensive and counter-productive.

One member reports: "I personally approve H.R. 5245, but I would omit the exception under § 552(b) (8), because the information regarding financial institutions should be widely disseminated to the public, in view of the public's financial stake in all our financial institutions. There are now too many justified complaints that big investors and big depositors are privy to information not available to small investors and depositors."

An out-of-town member suggested that final opinions of agencies should be available in any office where the agency transacts business, and that attorneys for the agencies be required to attach copies of unreported decisions where they are cited as authority.

Finally, one member expressed concern that the exemption for inter-agency or intra-agency memoranda in Section 522(b) (5) is not broad enough to prevent "probing the mental processes of the head of an agency". He suggested that this exemption be amended "with a view to redefining its scope in terms of the function of the document sought to be protected, rather than on the basis of the highly abstract questions as to whether or not certain portions of it are, or are not, 'facts'".

Finally, one member questions the wisdom of the general exemption for "inter-agency or intra-agency memorandums or letters" provided by Section 552(b) (5). While the purpose is to encourage candor in communications and recommendations within or between the various agencies, staff proposals may be more careful if they are subject to disclosure, and "far-out" options can always be labeled as such. Candor need not necessarily suffer if we become accustomed to conducting the public business in public. The foregoing, of course, does not apply to communications made privileged or confidential by statute or by common law such as communications between attorney and client, work product of government attorneys and the like.

We hope that these informed comments will be helpful. In the short time available to us it is not feasible to develop a consensus or total committee "position" on the subject of this legislation which obviously has so many ramifi-

cations. Hence, this is not part of the committee as a whole, and manifestly it does not purport to state or imply a Federal Bar Association.

Respectfully,

*Stuart H. Johnson, Jr.*  
*Chairman for Freedom of Information Act.*

STATEMENT BY JONATHAN MARSHALL, CHAIRMAN OF THE FREEDOM OF INFORMATION COMMITTEE OF THE NATIONAL NEWSPAPER ASSOCIATION AND PUBLISHER OF THE SCOTTSDALE (ARIZONA) DAILY PROGRESS, CONCERNING AMENDMENTS TO THE FREEDOM OF INFORMATION ACT

I am sorry that I cannot appear personally before the Committee for I feel very strongly that everything possible must be done to safeguard and strengthen freedom of information. In this regard, I would stress that freedom of the press really means freedom of the American people. Our role is strictly to serve as the eyes and the ears of the American people, and thus when we speak of freedom of information, we are concerned with the need to keep the public informed about its government.

The Freedom of Information Act was a great step forward. Unfortunately it has not accomplished all that its sponsors and Congress had hoped. There are all too many public officials, at all levels of the government, who still believe that secrecy is justified, or who wish to keep their own actions beyond the scrutiny of the public.

One weakness in the law appears to be that it is difficult for small newspapers to use it effectively. These newspapers do not have the resources of either staff or counsel to challenge violations of the law. As a result, for the most part, such violations are not taken to court. Therefore, I would hope that the law can be amended to simplify and expedite such appeals.

In addition, time is frequently a factor in developing news stories. When information is withheld from the public, a story often becomes stale before the facts are available. To safeguard against intentional delays in providing answers, I would suggest that government agencies be given a time limit to meet requests for information and that appeals might go directly to appeals courts rather than to the lower courts.

Finally, I support the statement made by the National Newspaper Association before the House Subcommittee considering amendments to the Freedom of Information Act.

HOSPITAL PRACTICE  
WASHINGTON OFFICE,  
*National Press Building, June 5, 1973.*

DEAR SENATOR KENNEDY, At your staff's suggestion, I enclose published articles and letters relating to difficulties I have had in applying the Freedom of Information Act in order to obtain Medicare inspection records.

The barrier placed before me by a resistant Department of Health, Education, and Welfare is a 1939 statute Congress enacted to protect the confidentiality of individual taxpayers, beneficiaries, and recipients in the Social Security System.

The use of this statute more than a quarter century later to preserve secrecy on Medicare records of inspections of hospitals, nursing homes, and other health facilities represents to me an abuse of the law as intended by Congress. No patient confidentiality is at risk in the documents I seek; I have found no patient names or identifying material in the documents made available to me under a 1972 court order. I believe these documents to be essential to a reporter seeking to grasp the operation of the Medicare system, to a Medicare beneficiary seeking practical information in the selection of a facility, and to the public in attempting to appraise the quality of care offered by the totality of facilities in his neighborhood or health-service market area.

Passage by Congress in last year's Social Security Act of a provision mandating the routine disclosure of Medicare (and Medicaid) inspection records was decidedly worthwhile. But, as you know, the mandate applied to future records; thus, as implemented by regulation, no pre-1973 inspection records are available. It will take at least a year before every nursing home or other health facility has been inspected by Medicare (and Medicaid) since the disclo-



sure "clock" began running. This will be a year in which the fruits of the 1972 legislation will be only half ripe.

However, the HEW bureaucracy continues to suppress pre-1973 inspection records on health facilities. It has ingeniously interpreted the 1972 action as an implied consent by Congress to the suppression of the facts on Medicare's past performance. Yet it is my belief that the 1972 legislation gave no such consent but rather represented Congress' belief that inspection records should be public *routinely*. Congress said nothing about prohibiting past records from being made available as requested.

The 1939 law's intent, I believe, leaves the inspection records exposed to the action of the Freedom of Information Act, which, it should be noted, protects the confidentiality of medical information and such personal records as personnel files. Reading the 1939 law together with the FOI Act would provide exactly the confidentiality prescription Congress intended for beneficiaries, taxpayers, and recipients in the Social Security System.

Such a reading would permit the public to learn the conduct of its business and to receive the information bought by its tax dollars. Some of this information may prove embarrassing to individual facilities (such as nursing homes), to individual administrators in the federal bureaucracy, and to individual legislators who favored provisions of law which don't work. But the test of whether information should be made public is not that it is innocuous but that citizens have a right to it (save for such protections as individual confidentiality).

I am sorry to say that the Social Security Administration declines to recognize this right. So far, the courts in the District of Columbia have divided on the question of whether the inspection records I seek are controlled by the FOI Act or the 1939 Social Security law. In Florida, the courts said FOI is controlling; in California, they said the Social Security law. Three appeals are under way.

The enormous investment of citizen effort and expense against HEW's refusal to disclose—a refusal financed by citizen money, i.e., tax dollars—would be entirely unnecessary if the bureaucracy would abide by the intent of the FOI law. So tenacious has the bureaucracy been that people normally proponents of the Social Security Administration have been flabbergasted. They, as I, have wondered why the tenacity.

It cannot be because the Social Security Administration believes the confidentiality of individual records is in jeopardy. SSA knows, as I pointed out above, that the FOI act would protect that confidentiality.

I respectfully suggest that any inquiries you undertake be directed at finding out if there is any good reason why the FOI Act should be opposed by this bureaucracy.

I believe that the disclosure issues I have had to raise in the courts will take a year or more to be decided in the D.C. appellate court. I will press that case to the best of my resources. I hope that Congress can find some way to make clear that it means business with the FOI Act and that it will not tolerate the perversion of the 1939 Social Security statute.

If I can be of any further assistance, please call on me.

Sincerely,

MAL SCHECHTER.

### Schechter Exhibit A

[NOTE: This article from the May 1973 *Hospital Practice* shows, in detail what is contained in some Medicare nursing-home reports. The homes are named.

*I wonder if any Medicare beneficiary would not want to know that a nursing-home he is considering is publicizing a nonexistent physical rehabilitation facility or has insufficient linen and no fire-safety evacuation procedures, etc.*

*Yet, for many months, these homes bore the Medicare brand. Medicare refuses to tell them what it knows to be faulty. It thus participates in the exploitation of the aged, be it deliberate or not.]*

### GOVERNMENT IMPACT ON HOSPITAL PRACTICE—A CLOSED DOOR OPENS: ACCESS GAINED TO NURSING HOME DATA

"It's interesting that when it comes to their own parents, physicians are troubled by their ignorance of nursing homes," says Dr. Robert N. Butler of

northwest Washington, D.C. A psychiatrist, Dr. Butler has many geriatric patients and is often asked by physicians, patients, and their families to recommend nursing homes. Frequently, the queries are desperate: an old person has had a stroke and no one at home can take care of his needs, or a patient long in declining health has reached a point where institutional care can no longer be put off.

The decision to institutionalize is often laden with guilt feelings and with fears that a loved one may be inadvertently consigned to a pesthouse, comments Dr. Butler. The news media frequently carry reports of patient abuses in nursing homes and congressmen have cited them as human warehouses. In Dr. Butler's view, recommending a nursing home is not to be taken lightly.

"And despite all this," he says, "there is precious little hard information a physician or patient or family can get on which to evaluate a nursing home. I know that few physicians really know what local nursing homes are like. They don't examine them with anything like the intensity they give to a hospital. And this is one reason why I feel nursing homes have been poor environments for patient care, by and large.

"Yes, I have been in homes. Some I can recommend. Many I cannot. But I haven't been to them all, even in my immediate area. I might be able to give more assistance—and so might other physicians—if the facts were available. That's why I wrote to Medicare last year."

Dr. Butler asked the Social Security Administration to grant access to Medicare nursing home inspection records for Virginia, Maryland, and the District of Columbia. The agency refused in an explanation Dr. Butler calls sheer nonsense. The agency said it was precluded from disclosure because Medicare nursing home records had not been exempted from secrecy as mandated by statute. The statute referred to was enacted in 1939 to protect the privacy of records of individual taxpayers and beneficiaries. But its language was extremely broad. The agency interpreted it to apply to records of institutional contractors when they first were evaluated for Medicare in 1966. The statute allowed for exemption from nondisclosure if prescribed for by regulation. Dr. Butler notes that the man who effectively wields this discretion is the Commissioner of Social Security. In effect, Social Security had bound its own hands, Dr. Butler believes.

"The fact that Social Security, ordinarily free with information to the public, declined to make these records available was astonishing. I was left to speculate that something was being covered up, such as the real condition of Medicare nursing homes and the effectiveness of the Medicare enforcement system," Dr. Butler says.

Starting this month (May) Dr. Butler, other physicians, and the public at large may go into a local Social Security or state welfare office and ask for summaries of Medicare and Medicaid inspection records. (At this writing, with details not complete, the possibility existed that physicians might have specific summaries copied at nominal charge and mailed to them.) For the first time in the seven-year life-spans of Medicare and Medicaid, the public will be able to learn what the inspectors see.

Although May Day inaugurates a "revolution" in public disclosure, it probably will take a year before records on all Medicare/Medicaid facilities in the Washington area or any other large locality will be on hand. According to regulations recently promulgated by the Department of Health, Education, and Welfare, records will be available on annual inspections made after January 31, 1973. It will take 90 days at most for summaries to be filed in the local offices.

Summaries will cover not only nursing homes but also participating home health agencies, independent clinical laboratories, and certain hospitals, i.e., those not accredited by the Joint Commission on Accreditation of Hospitals. J C A H reports, a basis for Medicare and Medicaid participation, remain confidential because they were not gathered specifically for the federal programs, although federal officials will look at them. However, any inspections by H E W to validate the results of J C A H surveys or to evaluate serious complaints are expected to enter the public domain.

In early 1972, when Dr. Butler wrote his letter, Congress was considering the disclosure issue. Specifically, it had a proposal directing the Social Security Administration to make future inspection records routinely available to the public. The proposal which first appeared in 1970 in the Senate Finance Com-

mittee, became law in late 1972 when Congress enacted Social Security legislation. The result was not wholly satisfying to Dr. Butler because it did not direct that current records be made available and therefore there would be delay in getting the facts he wanted.

By this time, several court cases were pending with demands that HEW open up current and past as well as future records under the federal Freedom of Information Act. In a District of Columbia case, HOSPITAL PRACTICE in September won a decision that this act governed access, not the 1939 secrecy statute. HEW declined to appeal and thus had to respect a court order to produce the requested records of inspection of eight Medicare nursing homes, or extended care facilities.

From these records, HOSPITAL PRACTICE now can provide a preview of the kind of information physicians and the public may find. The information obtained under court order appears valuable not only for the light shed upon the facilities but also for the light shed upon the administration of the Medicare system. What follows is a discussion of specific records on file for inspection of this publication's Washington office.

In the absence of access to additional records, those disclosed under court order and other information suggest that Medicare has an uneven history of enforcing the correction of deficiencies that its inspectors find. The Medicare program has evolved through the years and its current enforcement effort may be better than in the past. This, necessarily, is conjecture. While the public and physicians may rely heavily on the fact that a facility is "Medicare certified," this appears hardly a universal guarantee of ability to perform well or even of the absence of elementary fire-safety problems. Approval by Medicare should suggest that a home is worthy of being put on a list for investigation by a prospective client, but not that the home is necessarily free of severe problems, a nursing home industry source says.

Take, for example, a suburban Washington nursing home. In early 1972, about the time of Dr. Butler's letter, the Manor Care Nursing Home in Wheaton, Md., was visited by a county health department nurse, working under contract as a Medicare surveyor. The home had 92 patients at the time. The surveyor's report said, in part:

"Effective restorative nursing is vital in long-term care. There are several important factors in evaluating the effectiveness of the staff in providing this service. If there are 50 incontinent patients, as the patient census figures were reported to be, and none of them is on a bowel/bladder retraining program, then the nursing staff is not making every effort to help patients achieve independence in activities of daily living, etc., [and] therefore [the pertinent Medicare standard] is not met."

In a letter to Manor Care, the county health department advised that there must be developed and implemented within the next 30 days "an effective program in restorative nursing services."

The statement of deficiencies also noted that an advertising brochure was "misleading" in implying that "there is a well-equipped Physical Therapy Department when in fact the room designated for physical therapy gives the appearance of a storage room for miscellaneous pieces of furniture, equipment, odds and ends, etc." The facility was told to make corrections within 30 days.

Other findings, discussed with the management, related to inability of the woman who was the home's manager at the time of inspection to delegate certain responsibilities, as for nursing service. Subsequently, the files show, a new administrator was hired. The surveyor recommended expert consultation for the employee handling clinical records, and the health department asked for documented evidence by mid-July of attempts to recruit a consultant. A number of fire-safety lapses also were noted.

The survey used Social Security Form 1569, a 48-page checklist covering a host of standards and factors that make up the 18 Conditions of Participation for Extended Care Facilities. This comprehensive form covers, among other things, compliance with state and local codes, administrative structure, patient care policies and implementation, availability of medical findings and physicians' orders at time of admission, current medical supervision of each patient, availability of physicians in emergencies, extent of nursing staff and maintenance of nursing care plans, and dietary, pharmacy, social service, and house-keeping services.

In the hierarchical plan of review, the surveyor checks off the factors that spell out the meaning of each standard in order to determine if the standard



has been met. Reviewing all findings on standards, the surveyor then concludes that the facility is or is not in "substantial compliance."

The documents are forwarded to regional HEW offices. Officials of the Social Security Administration's Bureau of Health Insurance review the documents and decide if the facility should be certified or recertified. The final authority is in federal hands.

The survey report (Form 1569) and a supplementary report on fire safety will be available to the public only on request. It is the summary of findings, the statement of deficiencies, that will be on file at district offices.

One of the peculiarities of the Medicare system is that a facility with serious deficiencies can still be deemed in substantial compliance. (In the past, the public has not been informed which facilities are in full and which in substantial compliance.) How the judgment is made is not clear. No objective rating system for determining substantial compliance is known to exist. Some observers believe that federal judgments can be attacked legally as capricious and arbitrary.

This rubbery concept arose within the fledgling Medicare bureaucracy after Medicare was enacted. The staff of the Senate Finance Committee attacked it several years ago after finding that fewer than 25% of the 4,700 Medicare homes were in full compliance. Some 3,400 were in substantial compliance, a concept that "permitted many of the high standards to be disregarded," the staff said. Indicative of weak enforcement was the fact that few facilities ever moved out of substantial compliance into full compliance, the staff said. In 1972, Congress moved to phase out this concept with a system of limited-term contracts that shifts to the facility the burden of proving that it deserves to remain in the system. By contrast, Medicare had been set up with the burden on the government to prove a case for expulsion.

Sometimes a facility that is clearly substandard by Medicare yardsticks somehow enters the system. It is then hard to dislodge. The Grosvenor Lane Nursing and Convalescent Center, Bethesda, Md., with 55 of its 174 beds certified for Medicare, entered the system on April 25, 1968, and departed December 8, 1970, when ownership changed, according to Medicare records. Such a change means a facility automatically stops being a provider of care and must reapply as if entering the system for the first time. The center elected not to reapply, "probably because they were unwilling to make corrections," according to a Medicare paper.

The deficiencies included:

Insufficient nurses, no nursing care plans, no restorative program, no in-service education, and "aides and orderlies assigned duties beyond their capabilities."

No patient care policies.

No job description, no written personnel policies.

Not enough linen.

No emergency disaster plan; fire drills not held.

Shown to authorities in hospital administration, the record evoked amazement that a facility could ever have become Medicare certified with such deficiencies. The extended care benefit originally was supposed to be equivalent to the kind of care given in a progressive care wing of a hospital. But, under pressure to admit locally convenient facilities and to meet the need for bed space to handle the overflow from hospitals expected in the first Medicare winter, the program accepted more than twice the expected number of nursing homes. At the same time, at least some of Medicare's standards were written to allow wide discretion, most notably in fire-safety requirements. As Sen. Frank Moss (D-Utah) pointed out, the original fire-safety standards were given to inspectors as "guidelines" to be applied with discretion "in light of community need for beds."

Following a January 9, 1970, fire that killed 32 patients at a Medicare-certified nursing home in Ohio, the Social Security Administration belatedly started to implement (as a 1968 statute directed) the Life Safety Code of the National Fire Protection Association. Regulations did not appear until late 1972 and their implementation reportedly has been slow. In late March, a California legislator and a senior citizens' group asserted that over 700 Medicare and Medicaid nursing homes in the state had been approved without the required Life Safety Code survey. The charge, in part confirmed by a Medicare official, indicated that the system's reliance on state agencies to deliver on inspections

could not be invariably assumed. The California fire marshal's office said it was short the inspectors needed to carry out federal missions, even though Congress authorized 100% financing for them.

The Senate Finance Committee apparently believes that disclosure of inspection records will help keep the system on its toes and will "enable physicians and patients to make sound judgments about their own use of available facilities in the community.

"Given the necessary information, the community should be able to exert greater influence on institutions to assure that they develop and maintain high standards of care," the committee says.

The degree to which the new disclosure policy accomplishes these ends surely will be tested in the months and years to come.

### Schechter Exhibit B

[NOTE: These two Washington Post articles summarize results in my two FOI cases—the victory in 1972 and the loss in 1973.

Note that in the 1972 article, HEW Counsel Hastings told the Post's Morton Mintz that regulations probably would be amended to reflect the court decision on disclosure.]

#### HEW WINS ROUND ON NURSING

(By Morton Mintz)

An effort to compel the government to make prompt and full disclosure of records of nursing home inspections was turned back in U.S. District Court Friday.

Judge George L. Hart Jr. ruled that the Department of Health, Education, and Welfare had the right to keep confidential reports of inspections made for the Medicare program, which covers some 4,000 nursing homes.

Mal Schechter, Washington editor of Hospital Practice magazine, who has been battling HEW since a nursing home fire in 1970 killed 32 people in Marietta, Ohio, said he will appeal.

The government lost a similar case in Florida last year while winning another in California that is being appealed. Ultimately, the issue may go to the Supreme Court.

HEW's basic contention, backed by Judge Hart, is that all information gathered by the Social Security Administration for programs in its jurisdiction is confidential unless the department adopts a regulation to make it public. Congress granted the department this power in 1939, mainly to stop states from publicizing personal information about welfare recipients.

After the Marietta fire, Schechter informally asked HEW for records of inspections made for Medicare at the Ohio facility. The department denied the request.

Later in 1970, Schechter, aided by a lawyer furnished by Ralph Nader, formally petitioned HEW not only for the Marietta records, but for reports on eight other nursing homes—seven of them in the Washington area—as well.

Turned down again, Schechter filed the first of two lawsuits arguing that inspection records were public under the Freedom of Information Act.

Last year, Judge Joseph C. Waddy agreed. Meanwhile, Congress considered and then enacted amendments to the Social Security Act to make inspection findings available hereafter.

The department reacted by moving to make summaries of inspections—not the reports themselves—routinely available in Social Security district offices. The new rule applies not only to Medicare nursing homes, but to several thousands others benefitting from Medicaid financing.

However, the new rule, which led Schechter to file the second suit, applies only to inspections made after Jan. 31, 1973. Inspections being on an annual cycle, summaries generally won't become available for a year, and past reports are concealed.

In the District of Columbia, for example, four Medicare nursing homes were inspected late in 1972. Not until after they are re-inspected probably late in 1973 will any information become available.

This example was cited by Ronald Plesser, Schechter's lawyer, in oral argument Friday. But Judge Hart, with apparent reluctance, agreed with the gov-

ernment that the law does not require it to make prompt and full disclosure.

As of Friday, Schechter said, no nursing home inspection summaries were on file in Social Security offices in Alexandria, Silver Spring, or Washington.

He has been waging a parallel legal battle to try to force HEW to disclose Medicare records of inspections at Boston City Hospital, which in 1970 was certified for Medicare participation despite disaccreditation by the Joint Commission on Accreditation of Hospitals.

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[FROM THE WASHINGTON POST SEPT. 10, 1972]

## HEW ORDERED TO RELEASE REPORTS ON NURSING HOMES

(By Morton Mintz)

Public access to Medicare inspection reports on the nation's 4,500 nursing homes has been ordered by a U.S. District Court Judge.

The decision sharply restricts one of the most sweeping secrecy provisions in any federal program.

Judge Joseph C. Waddy told the Department of Health, Education and Welfare that it must produce the records sought by newsman Mal Schechter under the Freedom of Information Act.

Schechter had waged an often lonely three-year battle with the Social Security Administration to see inspection reports on hospitals and independent clinical laboratories in Medicare, as well as on nursing homes.

About 4,500 out of the total of some 7,000 nursing homes receive reimbursement under the Medicare program. They are inspected by state agencies under contract with Social Security. Almost 3,300 of these facilities—three out of four under Medicare—had significant deficiencies, according to a Senate Finance Committee report.

Some of these faults had been tolerated for years as coming within what HEW deemed to be "substantial compliance" with Medicare requirements, Sen. Abraham A. Ribicoff (D-Conn.) told the Senate in January.

Schechter, a senior editor in Washington of Hospital Practice magazine, asked in his lawsuit for inspection records on 14 nursing homes in the Washington area. He also asked for reports on a nursing home in Marietta, Ohio, where 32 persons died in a fire in 1970.

HEW had refused to make the reports available, claiming they were cloaked in secrecy by a 1939 law. Schechter contended that the law was intended to protect the confidentiality of records of Social Security beneficiaries and taxpayers, but did not apply to inspection documents under the Medicare program, which was established 27 years after the law was passed.

Judge Waddy granted Schechter's motion for a summary judgment against HEW. The order was dated July 17, but because of an apparent clerical slipup neither HEW nor Schechter was notified of it until last week.

A few days earlier, HEW, in an indirect partial concession to Schechter's arguments, published proposals to allow public scrutiny of inspection reports after an unspecified date. Past and current records such as those sought by the writer, however, would remain inaccessible.

On Capitol Hill, meanwhile, Ribicoff introduced an amendment to pending Social Security legislation that says explicitly that the 1939 law does not exempt nursing home inspection records from disclosure. In the House Rep. John P. Saylor (R-Pa.) introduced a similar amendment.

Yesterday, HEW General Counsel Wilmot R. Hastings told The Washington Post that while the department "probably" will appeal the Waddy decision to preserve its procedural rights, it is possible that the new proposed disclosure regulations will be amended to conform with Waddy's order.

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## Schechter Exhibit C

[NOTE: This April 1, 1973 article from the Washington Star-News summarizes the faults of the Medicare inspection system. It points out that Medicare takes good notes but is a poor enforcer. I wouldn't trust the Medicare brand on a nursing home without additional investigation.]



*A portion of this article dealt with a developing scandal of nursing-home enforcement in the California Medicare/Medicaid programs. Following this article, the National Senior Citizens Law Center in San Francisco and others learned that over 700 Medicare/Medicaid homes had not been inspected under the mandatory Life Safety Code. Numerous Medicare facilities had been certified as in compliance with Medicare standards, embracing that Code, even though the mandatory inspection had not been carried out. This is a violation of law.*

*As a result of these disclosures, SSA rushed federal inspectors into California and put pressure on California to hire immediately (100% federal reimbursement, allowed by law) the necessary number of fire safety inspectors.*

*I have information that the California "mess" was not unusual. My information points to the probability that the implementation of President Nixon's nursing-home initiative of the 1971 summer has been poor on fire safety, the weaknesses assignable to resistance in state agencies and team-playing by federal regional offices, who consistently failed to report to Washington on problems of implementation. Nor was there close monitoring by the Bureau of Health Insurance, SSA, although its chief acted quickly when informed by outsiders of the problems.*

*I dwell on this because the falldown in implementation is traceable to the secrecy with which HEW has covered its administration and the records of Medicare/Medicaid institutions.]*

#### NURSING HOMES—MEDICARE BRAND NO GUARANTEE

(By Mal Schechter)

If you happen to be looking for a decent nursing home and you use the Yellow Pages to do it, you'll frequently come across such phrases as "Medicare approved," or "Participating in the Medicare Program."

The words signify more than the fact that Medicare beneficiaries who need post-hospital extended care can get Uncle Sam to cover at least part of the bill for a while. The Medicare "brand" is supposed to be a mark of excellence.

It may be the best we have, but there are strong reasons to adopt the attitude, "Caveat Emptor—Let the Buyer Beware."

Congress has recognized that Medicare is an uncertain guide to nursing-home quality. The cumbersome system of certifying facilities—devised in an era when Medicare was eager to sign them up—has been criticized for operating on loose and loosely applied standards. Yet the system, as close to a national licensing system as exists, probably surpasses most state and local licensure standards.

Medicare certification records have been closed to the public by the bureaucrats, raising suspicions of a cover-up. You can't really find out what's wrong with any of the 4,000-plus approved Medicare facilities.

Which are in full compliance with standards? Which are in "substantial compliance?" Most are in the latter classification, which the Senate Finance Committee has found to be an ambiguous regulatory label.

Congressional reports that spell this out are, alas, not widely read. No industry group disseminates them. All the public hears is "Medicare approved," and that sounds good. Although otherwise enlightened on public disclosure, Social Security Administration (SSA) officials have refused to release inspection records, saying the public would not understand them and, besides, the only reason a home might get the tag "substantial compliance" is that it failed to pass muster on a few trivial matters.

In short, folks, don't worry.

But Congress thinks the public deserves to see the records it pays to compile. In the 1972 Social Security law, Congress directed SSA to routinely disclose the inspection records, starting with those made this year. Regulations to implement this were issued March 19.

In the few pre-1973 records made public under court order, there are glimpses of a system that takes good notes but carries a small billy club. According to federal records, a "substantial compliance" nursing home in mid-1971 had no patient-care policies, insufficient nurses, no restorative service program, insufficient linens, no emergency disaster plan and no fire drills. More over, its aides and orderlies were given duties beyond their capabilities.

Most of these problems existed in 1968 when the facility became "Medicare approved." Its expulsion from the program came in 1971, and then not because of the deficiencies but because the home had changed owners. The rules say change of ownership means the facility is automatically out of the program and must reapply. The home decided not to reapply.

Had it not been for the owner change, the facility could have kept its Medicare label and bargained or fought for years through a cumbersome administrative process if expulsion were attempted. The way Medicare was set up, the burden is on the government to throw the facility out.

The inspections usually are done each year under SSA contract by state and local health department employees. The administrative and technical weaknesses of many of these people, their sometimes superficial knowledge of federal standards, are acknowledged by federal officials—in private. Officially, they say they have no reason *not* to trust them all.

The SSA San Francisco office recently certified some California nursing homes without the required fire-safety surveys. This contravened regulations and the law.

Federal law prohibits SSA from certifying a nursing home without the fire-safety survey. But, said Thomas M. Tierney, director of SSA's Bureau of Health Insurance, the practical problems have to be considered. Do you want to move old people out of these homes pending a survey, he asked.

California has 10 people in the state fire marshal's office to do the surveys. Four are recent replacements. They simply do not have the capacity to do hundreds of surveys immediately. The nursing homes do meet the California fire code, Tierney said, but he noted that the state code is not as stringent as the federal. The facilities approved without the required fire-safety survey are not new in Medicare, "and we have no indication that they are in compliance with the (federal) code."

But a man who has watched Medicare's implementation closely suggested that Social Security was obligated under the law to do the surveys itself—quickly.

How so many nursing homes got into Medicare in the first place is unclear. Before enactment of the program, SSA assumed only 2,000 would be able to qualify. Twice as many got in. Besides weak application of standards, possible explanations include the fear in the first Medicare winter (1966-67) that hospitals would be inundated with sick, old patients and, therefore, beds were crucial. In addition, many communities urged SSA to provide for convenient local facilities.

Sen. Frank Moss, D-Utah, chairman of the Senate Aging Committee's long-term care panel, once put the finger on an answer. The original Medicare fire-safety standard permitted many questionable facilities to join the program. Inspectors were told that "standards" were merely "guidelines" to be applied with discretion "in light of community need for beds." This, said Moss, is a "non-standard."

In 1968, spurred by Moss, Congress incorporated the Life Safety Code of the National Fire Protection Association, 1967 edition, into Medicare and Medicaid. Despite a Jan. 1, 1970, deadline for putting this code into effect, SSA did little in advance. Medicaid at least issued the necessary regulatory paper.

On Jan. 9, 1970, a Marietta, Ohio, nursing home—"Medicare approved"—burned with loss of 32 lives. Highly flammable carpet, poor evacuation plans and practices and lack of smoke-confining hallway doors were among the things that contributed to the loss of life. All these things are covered in the code.

Moreover, the state fire code, which the original Medicare standards incorporated by reference, had not been followed. The Marietta carpet exceeded the flammability limits. An inspector just hadn't bothered to check the carpet against the standard when the home opened.

Seemingly chastened by Congress, SSA's Bureau of Health Insurance told state health departments to apply the Life Safety Code immediately to Medicare facilities. But it did not issue the necessary regulations until October, 1971 almost two years later, on the eve of a Moss inquiry into Medicare procrastination.

The bureau has reported major problems in interpreting the code but outside observers say it tended to second-guess the code on sensitive issues, sometimes hunting for soothing, less expensive compromises and sometimes taking techni-

cally extreme positions that had the appearance, at least, of being on the side of the angels. The effect was to delay regulations.

There have been two major recent efforts to put some iron into regulatory efforts. In mid-1971, President Nixon ordered a campaign to upgrade nursing homes receiving federal dollars. The principal focus was on Medicaid, a program in which states are assisted on the assumption they follow federal standards. The President's program produced a crash effort that removed at least the worst nursing homes from Medicaid, officials say. Some were also in Medicare.

The second major effort was in Congress. In last year's mammoth Social Security law, Congress directed the phasing-out of Medicare's "substantial compliance" category by having Medicare copy a Medicaid regulatory model. Medicare facilities, as they fall due for their annual inspections, will be given 12-month contracts—if found in full compliance. If found to have deficiencies—and these must be specified as not jeopardizing the health or safety of patient—they will get a six-month agreement, provided they have remedial plans. If reinspection shows failure to comply, only one further six-month agreement can be made.

On various fronts—local, regional, central, and policymaking—the history of the "Medicare approved" label should suggest caution. "Progress is being made slowly but surely," a Capitol Hill observer says, acknowledging that for the moment the nursing-home user is best advised to remember caveat emptor.

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### Schechter Exhibit D

[NOTE: I am told this article infuriated Commissioner Ball.

I had gone to him privately several times to bring his attention to the unjustified use of the 1106 secrecy power. I assumed that had he full understanding of how his lieutenants were applying 1106, he would move to open up the files.

Since nothing happened bureaucratically, I took my views to the public through this article which appeared in the Washington Post in Sept. 26, 1971. It had been submitted four months previously after revisions. (I believe the facts remain correct; my opinions on how to change the FOI law, however, have changed in regard to having a board of newsmen, public representatives, and bureaucrats form a review board. I now think it would be better to have no board; cases should be heard expeditiously by the courts; I believe there should be penalties, as Ralph Nader suggested, for unjustified nondisclosure; and I believe there should be some way of nullifying such broad grants of secrecy power as section 1106 insofar as they go beyond the personal privacy and other exemptions of the FOI act.)]

### MEDICARE'S SECRET DATA

By Mal Schechter

*Schechter is Washington editor of Hospital Practice magazine.*

In 1939, the fledgling Social Security System warned Congress of a problem vitiating its objective of humane aid to the poor. Political candidates in some states acquired, legally, the names of Old-Age Assistant recipients and deluged them with campaign propaganda, promises and warnings. Tradesmen also used the lists. A few states actually required publication of the names to deter the poor from seeking relief.

Social Security Board Chairman Arthur Altmeyer asked Congress for authority to require confidentiality of records. Not only to protect assistance recipients but also individuals in the payroll tax program of old age and survivors insurance. Congress agreed.

Section 1106 of the Social Security Act to this day ranks as one of the most sweeping secrecy provisions in any federal program. It forbids disclosing "any file, record, or other paper or any information" obtained by the system or provided for official use, except as the Social Security commissioner expressly allows.

A quarter century after Altmeyer's plea, Medicare began.

There lies the rub. For Section 1106, implemented by Regulation No. 1, covers relationships hardly imagined in 1939.



Medicare deals with hospitals, nursing homes, clinical laboratories, physicians, health departments, and insurance companies. What Congress intended as protection of payroll taxpayers and beneficiaries has been extended to Medicare's corporate servants. The "authority to refuse to disclose"—as Regulation No. 1 puts it—has mushroomed, and this restricts the public's right to know about the quality of care it receives and the quality of Medicare's administration.

Much information on specific facilities is not open to the public, such as reports on Medicare-financed inspections of nursing homes and hospitals. These surveys contain information bearing on patient health and safety which could be important to families trying to place a relative. Or to newsmen, students of health care and public administration, or anyone who wants to know how good or bad a community is served by the health establishment.

But nobody can get these reports from Social Security.

In New York State, on the other hand, information on institutional deficiencies gathered by the state is, by law, public information.

Social Security Commissioner Robert Ball says he realizes that deficiency disclosure could help the public and patients, but he emphasizes "undesirable effects." He insists Medicare doesn't certify a facility endangering the patient's health or safety. Therefore, public disclosure of lesser deficiencies in certified institutions "might create unwarranted concern" or an "adverse public reaction (that) could severely hamper an institution's efforts to maintain patient loads while effectuating needed improvements."

#### SHORTCOMINGS SHIELDED

That serious deficiencies exist under Medicare is hardly hallucination. Federal auditors repeatedly have found Medicare homes lacking complete fire protection programs, required nursing attention, required physician attention, necessary emergency electrical service, and complete nurses' call systems.

Which ones? Don't ask the Social Security Administration.

Medicare certification is hardly an infallible guide to quality. Of some 4,500 Medicare nursing homes mentioned in a Senate Finance Committee report, nearly 3,300 had significant deficiencies, some tolerated for years in the category of "substantial compliance" with standards. The public never is told which homes are in "full" and which in "substantial" compliance. The Finance Committee says administrative legerdemain permits disregard of many standards.

The nation has the word not only of auditors but also of President Nixon that something is seriously wrong with federally subsidized care in nursing homes. Much of the President's recently announced effort to tighten up federal supervision of nursing homes appears directed at officially tolerated abuses—perhaps in good measure tolerated behind a screen of nondisclosure.

Although Social Security has some good words for disclosure, it has backed off from an innovative proposal by the Finance Committee. Last year, the committee proposed that Medicare publish information on deficiencies if an institution fails to correct them within 90 days. The proposal is still pending. Social Security has come up with many reservations to the plan without acknowledging the public's right to information. Ball has argued that "widespread and indiscriminate dissemination of information about deficiencies" may have some undesirable effects.

The public's right to know may be forever in conflict with such official paternalism, whether altruistic or self-serving. Often considered one of the better bureaucracies, Social Security has a record on Medicare nondisclosure that goes beyond nursing homes. It was reluctant to name insurance companies that it found to be poor Medicare fiscal agents, including District of Columbia Blue Shield. It declined to disclose results of a Medicare survey of Boston City Hospital after discreditation by the Joint Commission on Accreditation of Hospitals; nondisclosure prevented an attempt to compare certification systems. Social Security is silent on revealing the names of Medicare nursing homes that have highly inflammable carpeting. It has stopped a state agency from describing the administrative process that permitted a leading clinical laboratory to be certified for four years without meeting key standards.

Even reimbursement information has been played close to the vest. When first asked for specific payments to hospitals, the agency said nothing doing:

Regulation No. 1. Fortunately, Ball relented because "there is not the same validity in withholding information concerning the payment of public funds to institutional providers of Medicare services as there is in the case of information on Social Security payments to individuals."

Ball made the data available and amended Regulation No. 1—but only to disclose institutional payments, not deficiency data. Alas, the hospital payment data turned out to be inadequate for comparing institutions on costs related to patient load. This raised questions about Medicare's capacity to analyze costs and influence development of cost controls amid medical-hospital inflation. A promise that good comparative data would be published regularly remains unkept.

Given specific hospital payment data, the extent to which Medicare financed certain racially discriminating Southern hospitals was assessed by Hospital Practice. The report led to tightening up of a Medicare loophole. There was no difficulty obtaining specific civil rights data from the Office for Civil Rights of the Department of Health, Education, and Welfare; that office said the records were public information.

#### SOOTHING THE INDUSTRY

The application of Regulation No. 1 to Medicare may be a historical result of the health industry's opposition to enactment of the program—and especially to its chief spokesman, Wilbur Cohen, then HEW under secretary. After enactment, Cohen, prodded by the White House, emphasized consultation and conciliation. Consumer representatives, including organized labor, followed Cohen. Much of the regulatory work was confidential from the very start. In this atmosphere, Regulation No. 1 was handy.

The bureaucrats who moved over from the cash-payments and disability-payments programs had matured at the knee of Regulation No. 1. A history of early Social Security days points to the founding policy of shunning political controversy at almost all costs. This meant a tight lip on information that might stir things up even more for a young social program in the hostile 1930s. The system had to be above reproach and suffer its pains quietly.

These themes may have figured in the application of Regulation No. 1 to Medicare. The commissioner could have excluded the new relationships from nondisclosure. Psychologically, 1966 may have been 1936 all over again in the bureaucracy. Whatever the reason, frankness with the public has not been a Medicare hallmark where controversy portended—neither under the Democrats nor under the Republicans, who, the bureaucrats are aware, have special ties to protect in the health establishment, especially insurance companies.

Some officials argue that it is enough that congressional committees get information. Still, information on deficiencies does little practical good to the man in the street when deposited on the Hill under a "confidential" stamp. Nor, one might argue, should congressional oversight delimit the public's right to information. Medicare records probably are a mine of information for communities on the quality of medical-hospital care. Disclosure might generate healthy corrective pressures in localities.

The dangers of secrecy, some officials argue, are outweighed by the dangers of disclosing undigested technical information. Raw data might do the public little practical good. The proper rejoinder may be that government must provide the context to give data meaning, with other sources free to comment on the facts. The HEW Audit Agency has such a pattern so readers can judge for themselves.

#### THE CHANGES NEEDED

A few steps could give the public access to Medicare information. First, Section 1106 should be replaced by a simple statement limiting confidentiality to taxpayer-beneficiary-patient records. All other information should be subject to the 1967 Freedom of Information law.

This statute assumes that all information in federal hands belongs to the people and is disclosable, with certain exceptions—such as internal policy memoranda, trade secrets and patient records. Unfortunately, the 1967 law exempts any antedating statutory authority for secrecy, such as Section 1106. Also lamentably, the law has been laced with bureaucratic interpretations that have created or widened loopholes.

The information law should be amended to narrow the loopholes, especially to make clear that factual material must be disclosed on request in timely fashion. Where doubt exists about "confidentiality," the matter should be examined by a board including non-bureaucrats. For example, the President might name such a board from newsmen, public representatives and bureaucrats. Among other things, they might have power to release the substance of documents after "sanitizing" to preserve necessary patient-beneficiary confidentiality. The board should work rapidly. Its decisions should be subjected to immediate court review.

Further, in the current debate over national health insurance all proposals should carry an explicit requirement for freedom of information, avoiding secrecy from the start. The debate over forms of health insurance, quality of care, economics and efficiency of services, and governmental-versus-private roles might be better informed today if the people had the facts.

Finally, the Senate Finance provision on releasing deficiency information should be enacted without delay. Anyone seeking to learn about the quality of a facility should be able to look it up at a district Social Security office. The same information on institutions in Medicaid and other government programs should be public, as should results of hospital accreditation inspections which form the basis for joining government programs.

Thomas Jefferson once said, "Give the facts and they will know what to do." Medicare should do no less.

### Schechter Exhibit E

[NOTE: Although I won a test case on disclosure of Medicare inspection records in 1972, HEW declined to appeal but decided nonetheless that no precedent had been set.

The statement by S. J. Barrett of HEW simply declares that my case "was not an appropriate vehicle for raising the issues in the appellate court."

I believe there should be a requirement of law that a federal agency either prosecute a Freedom of Information case through an appeal or, declining to appeal, accept the lower court precedent as binding. To decline yet to not concede the precedent is to prolong a resolution of the issues to the detriment of the public and the press.]

The following was dictated by the HEW public information office at 3:10 p.m. 10-24-72. It is a draft prepared by S. J. Barrett, deputy general counsel, HEW, and dated 10-19-72.

In accordance with an order of the U.S. District Court for the District of Columbia, entered on July 17, 1972, the Social Security Administration has made available to Malvin Schechter, the plaintiff in the action in which the order had been entered, copies of extended care facility reports relating to 15 nursing homes. The D.S. attorney for the District of Columbia, in a related action, is withdrawing a notice of appeal from the July 17 order which his office had previously ordered.

The solicitor general of the United States determined that the Government should not pursue the appeal in the Schechter case, for two reasons. First, the Social Security Administration, after the entry of the district court order, prepared and published in the Federal Register a proposed amendment to its regulations concerning disclosure of information, which amendment would provide for public disclosure of reports such as those sought and obtained by Mr. Schechter in his lawsuit, where such reports were prepared in the future according to procedures adequately assuring fairness to the nursing homes reported on.

Second, Congress had passed and sent to the White House for the President's signature the welfare reform bill, H.R. 1, which contains a provision for public release of any of this type of report prepared six months or more after make was simple: the regulation HEW proposed in expectation of passage of questions such as those involved in the Schechter case.

The solicitor general has advised the Department of Health, Education, and Welfare that his determination not to pursue the appeal in the Schechter case does not indicate the Government's acquiescence in the ruling of the District Court or any agreement that it correctly states the rule of law applicable to requests for disclosure, such as that by Mr. Schechter. Rather, it was a deter-



mination that the Schechter case, in light of the considerations just described, was not an appropriate vehicle for raising the issues in the appellate court. Accordingly, the Department of Health, Education, and Welfare, in responding to future requests for disclosure of similar documents, will be guided by its present regulations prohibiting disclosure, subject to any amendments that may be adopted in line with the proposed amendments already published for public comment and subject to any change in the statutory law resulting from possible enactment of H.R. 1. This means that, for the present, the Department of Justice will oppose any further efforts to obtain court orders for the disclosure of nursing home survey reports that have already been prepared.

### Schechter Exhibit F

[NOTE: The point which Ron Plessner in the attached letter and I by an appearance before the Health Insurance Benefits Advisory Council tried to make was simple: the regulation HEW proposed in expectation of passage of HR 1 continued the bureaucratic seizure of secrecy authority.

My comment to Arthur Flemming notes that the prospective release of inspection records routinely is authorized by a section of HR 1 that is not hinged to Section 1106, the secrecy section.

It is interesting to note that the proposed regulation went through changes that successively limited the amount of information to reach the public routinely. The first published draft regulation called for disclosure routinely of the entire survey report on an institution. The second draft was for summaries of compliance and noncompliance information. The final version, now operative, calls only for summarizing deficiencies.

In effect, the Medicare beneficiary and the health services consumer has been given a smaller amount of information than Congress in Section 299D of HR 1 provided for. The limitations serve to inhibit comparison "shopping".

RONALD L. PLESSER, ESQ.,

ATTORNEY-AT-LAW,

Washington, D.C., September 29, 1972.

Mr. ROBERT M. BALL,  
Commissioner of Social Security,  
Department of Health, Education and Welfare,  
Washington, D.C.

DEAR SIR: This letter is a comment upon the proposed amendments to disclosure regulations of the Social Security Administration as they appeared in the Federal Register, Vol. 37, No. 172 on Saturday, September 2, 1972. These proposed regulations deal primarily with the public disclosure of survey reports which are compiled on each health care facility which is an eligible institution under Medicare. To the extent that these proposed regulations attempt to regulate the disclosure of such survey reports under the authority of section 1106 of the Social Security Act, 42 U.S.C. § 1306, they are improper and without legal foundation.

An order dated July 17, 1972 of United States District Court Judge Joseph C. Waddy in the case of *Schechter v. Richardson*, Civil Action No. 710-72, states that survey reports of the nature covered by the proposed regulations are not specifically exempted from disclosure by virtue of 42 U.S.C. § 1306. Consequently, they were held publicly available under the Freedom of Information Act, 5 U.S.C. § 552. In that case extended care facility survey reports were ordered to be disclosed within 20 days of the date of the order.

The proposed regulations have the effect of restricting the public access to all such survey reports which were compiled prior to the effective date of the proposed regulations and grants access to all survey reports compiled after such date only as a matter of the Secretary's discretion. The Secretary of Health, Education and Welfare as a matter of law must disclose all survey reports and has no discretion in their release.

A notice of appeal has been filed by the Secretary of Health, Education and Welfare in the above referenced case and it is strongly suggested that no regulation be promulgated restricting the release of survey reports already compiled at least until the issue has finally been determined in the Court of

Appears. Promulgation before such time would be illegal in light of the District Court opinion and would unnecessarily confuse the issue on appeal.

In light of the decision of the District Court in *Schechter v. Richardson*, the Social Security Administration should withdraw the proposed regulations and make available at once all survey reports. This would benefit the public in their quest to know about the conditions in health care institutions. The Social Security Administration is, of course, free under the Freedom of Information Act to issue regulations concerning the time, place, fees to the extent authorized by statute and procedure to be followed in the disclosure of the survey reports. It is hoped that the Social Security Administration will withdraw its proposed regulations and issue instead such regulations as are authorized by the Freedom of Information Act, 5 U.S.C. § 552 (a) (3).

Very truly yours,

RONALD L. PLESSER.

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WASHINGTON OFFICE, November 10, 1972.

DEAR MR. FLEMING: In the recently signed Social Security amendments is a provision for disclosure of Medicare nursing home inspection reports. Ironically, this provision is being interpreted by the HEW Department as sanctioning nondisclosure of some of these reports.

There is probably a "Catch 22" to be written about the Department's responses to efforts to open up these inspection reports. As you know, I won a suit in District Court here. HEW agrees I won it and that I won it so well that the government would not appeal it. Nonetheless, the Office of General Counsel issued an interpretation that the case established no precedent but simply afforded me access to a handful of inspection records.

The fact is the District Judge, in ordering disclosure, found that the 1939 secrecy provision of the Social Security Act (Section 1106) does not apply to such records. The judge couldn't have been clearer in demolishing the Social Security Administration's request for dismissal of my case.

Moreover, when I took advantage of Executive Order 11671 to plead before the secretary's Health Insurance Benefits Advisory Council last month to look over the issues in my case before advising adoption of a disclosure regulation hinged on Section 1106, I found the council had never been informed by SSA staff that an issue had been raised. Several council members asked for briefing materials so they could appraise the situation themselves at the next meeting. A little later a Social Security official told me everything was set for Mr. Richardson's approval of the proposed regulation and, he said, the council would not get to the matter again.

You yourself were at the briefing on HR 1 and heard the inaccurate statements of Commissioner Ball. He may have been misinformed when he gave two reasons why disclosure of current reports was being avoided by the Department. He said (1) nursing homes have had no opportunity to comment on the reports and (2) the reports were not in a form digestible by consumers.

Because of the records obtained under court order, I can demonstrate to anyone wishing to look that it is routine SSA procedure to inform the nursing home about deficiencies and to obtain a plan of correction. Nursing homes do comment. Nursing homes do know what the inspector has found. Only the public does not know.

As to consumer value, I can cite current inspection findings that a D.C. nursing homes does not comply with Medicare nursing service standards. It is as plain as an X in a box marked "not in compliance" on the form. (Other records also show deficiencies—in dietary service, in fire safety, and other features.) One has only to look at the plan of correction that the nursing home must file. This reveals in an nutshell what is wrong and how the home proposes to remedy the deficiencies.

I began by noting an irony. Congress approved Section 299D of the Social Security law. This section, which is not referenced to Section 1106, says that—beginning at a date in the future—records of inspections made thereafter will be available to the public, in Social Security district offices. (The regulation considered by HIBAC, however, is referenced to Section 1106 and carries out Section 299D and another section relating to other records.)

It is the opinion of the HEW general counsel that Section 299D implies Congressional sanction to secrecy of current and past nursing home inspection records.

The point was made at the HIBAC meeting by Mr. Thomas M. Tierney, director of SSA's Bureau of Health Insurance. And I responded by quoting the Senate Finance Committee staff as saying that 299D was entirely neutral and that there was no intent to prevent application of the Freedom of Information Act.

In Section 249C, another disclosure provision applicable to performance of carriers, intermediaries, state agencies, and providers in Medicare and Medicaid, the intent was to encourage disclosure and only to state the minimum expected by Congress. Historically, the two sections—249C and 299D—were part of the same package and the Finance Committee's approach was the same: to state a minimum, not a maximum, for disclosure.

"It is the committee's intent that the requirement of disclosure of such evaluations and reports not lessen the effort of the (HEW) Secretary in his present information-gathering activities nor is the provision in any way to be interpreted as otherwise limiting any disclosure of information otherwise required under the Freedom of Information Act," says the Finance Committee report on 249C. The same position was to be stated in 299D but, in the press of completing the committee report on the mammoth HR-1 bill, it was inadvertently omitted, the committee staff tells me. Nonetheless, they assure me that 299D was not intended to take away the fruits of the decisions in Freedom of Information cases.

Yet such is HEW general counsel's interpretation

Already, that interpretation has been applied to a request of the Camden Courier-Post for Medicare inspection records in New Jersey. The newspaper based its request on the D.C. District Court decision and was told it didn't apply.

Subsequently, to carry forward my investigations, I asked for clinical laboratory and hospital records, citing the case I won in District Court. I asked for an opportunity to inspect and copy these records under the Freedom of Information Act, and I asked for a reply within two weeks.

More than two weeks have passed, and the Social Security commissioner has made no reply. My attorney, while attending a Supreme Court session, was told by a Justice Department source that the new Social Security law has created a "new ballgame," in short, the additional records I seek will not be produced.

One of these additional records relates to Boston City Hospital. I enclose a September 29, 1970, letter which suggests that if I have patience Congress will settle the 1106 problem. But, the letter says, as of that time 1106 prohibits disclosure unless the Secretary shall be regulation prescribe.

I am sorry to have to chronicle injustice piled on injustice. The saga is not so much an affront to me and other newsmen as it is an affront to the Congress and to the supervisors of the bureaucracy, specifically the Secretary himself. In his name, the Freedom of Information Act has been trivialized and Section 1106 has been stretched far beyond its intent.

I would venture to say that none of the issues I have had to raise in order to obtain public documents would have been raised had the Secretary been advised to make a prescription as 1106 provides. Had he been advised to follow the policy his own Freedom of Information regulations declare—that even where nondisclosure authority exists, it does not necessarily have to be exercised—I would not have traveled the road that took me into court.

Would you help me to get this message to the Secretary and to urge him to make his own review from top to bottom? I would be glad to offer any assistance.

Sincerely,

MAL SCHECHTER,  
Washington Editor,  
"Hospital Practice".



## Schechter Exhibit G

*[NOTE: Despite my 15 November letter, SSA never replied.  
An erroneous government circular has been allowed to stand.*

*This incident suggests to me that there should be a provision of law requiring the government, on a valid challenge, to retract an erroneous circular.]*

[FROM THE WASHINGTON POST SATURDAY, OCT. 28, 1972]

## BUREAUCRACY COMES TO NAKED CREEK

## GOVERNMENT COVER-UP

Despite a federal court ruling that nursing home files should be open to the public, Social Security Commissioner Robert Ball has brazenly suppressed information on the quality of nursing homes where many older Americans spend their last years.

It's common knowledge in the health industry that some of these facilities are unsanitary firetraps. This is information, obviously, that the public is entitled to know.

The 4,500 nursing homes that receive Medicare money must pass federal inspection. This usually isn't too difficult; routine approval is given if the homes are in "substantial compliance" with federal standards.

The nursing home inspection reports, however, are never released. The taxpayers, who paid for the inspections, can't find out which homes are safe and clean.

For three years, an enterprising investigative reporter, Mal Schechter, has battled with Social Security to gain access to inspection reports on nursing homes, hospitals and clinical laboratories.

He bumped into a brick wall at Social Security. So Schechter enlisted the help of a Ralph Nader attorney, Ron Plessner, and filed suit under the Freedom of Information Act. They argued that an old Social Security law, which protects the privacy of individuals, shouldn't be used to hide nursing home deficiencies.

Federal Judge Joseph C. Waddy agreed and ordered the release of 15 reports requested by Schechter. Reporters assumed this settled their right to nursing home information. But they didn't reckon with the wily ways of the bureaucrats.

Commissioner Ball has chosen to interpret Judge Waddy's decision as an order to release only the specific reports requested by Schechter. If reporters want to see other inspection records, they, too, must go to court.

This amazing cover-up policy has been put in writing. "The Department of Health, Education and Welfare, in responding to future requests for disclosure of similar documents, will be guided by its present regulations prohibiting disclosure," states the directive.

"This means that for the present, the Department of Justice will oppose any further efforts to obtain court orders for the disclosure of nursing home survey reports that have already been prepared."

Footnote: A Social Security spokesman candidly admitted that the agency is treading water to see what happens. They note that a case similar to Schechter's is pending before federal court in northern California, and they hope it will be decided in their favor. They also point out that a bill governing access to their records recently passed Congress. The new law, however, will open the records at some future date and wouldn't permit public access to reports of previous inspections.

## PUBLIC INFORMATION

SSA PROGRAM CIRCULAR, November 6, 1972.

This letter from the Commissioner should be offered to any newspapers in the DO or BO service area which may have carried the recent Jack Anderson column on the disclosure of information concerning deficiencies of extended care facilities.

TO THE EDITOR: In a recent column Jack Anderson alleged that, despite a court ruling that nursing home files should be open to the public, the Social Security Administration was not releasing the information.

This is not true.

The cited court order responded to the plaintiff's specific request for back reports on 15 named nursing homes (only 7 of which were in fact participating in the Medicare program).

There was no hearing, no written opinion, and no final resolution of the broader legal issues. The reports, covering inspections of the 7 nursing homes over the years back to 1966, a total of over 600 pages, have been made available to the plaintiff in accordance with the court order.

It should be noted, however, that even before the parties were notified of the court order, proposed regulations had been published in the Federal Register to make available to the public through social security offices in all communities, information from future surveys of any institutions participating in the Medicare program.

Further, the Congress in H.R. 1, the Social Security-Welfare Reform bill, enacted on October 30, has given legislative support to the intent of the proposed regulations, providing for the prospective release of information from surveys as to the presence or absence of deficiencies in such areas as staffing, fire safety, and sanitation.

The issue raised by Jack Anderson revolves solely around the release of old reports usually no longer a reflection of conditions at the nursing home involved.

Sincerely yours,

ROBERT M. BALL,  
*Commissioner of Social Security.*

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"HOSPITAL PRACTICE"  
*Washington Office, November 15, 1972.*

COMMISSIONER ROBERT M. BALL,  
*Social Security Administration,*  
*Baltimore, Md.*

DEAR COMMISSIONER BALL: There are several inaccuracies in your SSA Program Circular 354 of 6 November. As it stands, it misrepresents or misleads. I ask you in the name of fair play to issue quickly a corrective release to your offices and to any newspapers to which 354 was sent.

1. My specific request was not for "back reports" but for the latest inspection reports, that is, current ones.

2. I received 8, not 7, ECF survey reports and correspondence.

3. None goes back to 1966. The oldest is 1969 (Baptist Home). The others are dated 1971 and 1972, representing the latest survey. The most recent correspondence is dated September, 1972, relating to an April 5, 1972, survey.

4. As to "no final resolution of the broader legal issues," it is not clear just what SSA wants. The court order is written and there were no hearings because there was no material issue of fact. None was necessary, in the judge's view, obviously.

Moreover, the essential issue was addressed by the court in the order in unmistakable terms when it said it was

"\* \* \* of the opinion that the documents sought to be produced, i.e. the Extended Care Facility Survey Reports, are not specifically exempted from disclosure by virtue of the provisions of 42 USC 1306, and that these sought after documents are therefore not exempt from disclosure under the provisions of the Freedom of Information Act, 5 USC 552(b) (3). . ."

5. It is inaccurate to state that the issue raised by Jack Anderson "revolves solely around the release of old reports," because the reports are the latest available to you. I have examined the records and I do not see a basis for the sweeping statement that these records are "usually no longer a reflection of conditions at the nursing home involved."

6. The circular does not make clear that, despite the judge's order and opinion cited above, SSA continues to refuse to release current inspection reports of the type I have asked for.

Sincerely,

MAL SCHECHTER.

## Schechter Exhibit H

U.S. SENATE,  
COMMITTEE ON FINANCE,  
Washington, D.C., November 14, 1972.

Mr. MAL SCHECHTER,  
Senior Editor "Hospital Practice",  
Washington, D.C.

DEAR MR. SCHECHTER: This is in reply to your recent letter concerning legislative intent with respect to Section 299(d) of Public Law 92-603.

That section, as you noted, relates to prospective public disclosure of institutional survey reports in Medicare and Medicaid.

Section 299(d) constitutes a routine approach, in law, to making available to the public, in the future, health department survey reports as to the capacity of health care facilities applying for participation or participating in the two programs. This new provision in the law was not intended to estop any disclosure which might otherwise be required under other relevant Federal law—such as the Freedom of Information Act—with respect to present, past or future surveys.

I trust that the above information is responsive to your question.

Sincerely,

RUSSELL LONG,  
Chairman.

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AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,  
Reston, Va., July 6, 1973.

THE HONORABLE EDWARD M. KENNEDY,  
Chairman, Subcommittee on Administrative Practice and Procedure, Committee  
on Judiciary, Dirksen Senate Office Building, U.S. Senate, Washington,  
D.C.

DEAR MR. CHAIRMAN: We are submitting this letter as the comment of ANPA for the record of hearings by your Subcommittee on S. 1142, amendments to the Freedom of Information Act. The American Newspaper Publishers Association, with membership representing more than 90 percent of the total circulation of daily newspapers in the United States, is of course, vitally interested in any proposal which will open up government records for public scrutiny.

The members of the Government Relations Committee of ANPA recently reviewed the proposed amendments, and our comments are based primarily on that review.

We believe that any effort to make the Freedom of Information Act more workable and more efficient is commendable. Anpa's general position is that we favor a bill which makes available the widest possible selection of information contained in the government files and records to the press and the public. As one of our committee members aptly stated, we would oppose as much as possible any restrictions on the availability of such information except, of course, for reasons of national security or privileged situations where exposure of the records would impede the proper conduct of government business.

We in the newspaper business are well aware of the criticisms of us for not making sufficient use of the Freedom of Information Act. We believe that if the Act were duly amended to provide a shorter response period, a less cumbersome appeal procedure when requests are denied, and accountability of agencies to the Congress, the Act would certainly be more adaptable to newspaper and public interests.

Additionally, we feel strongly that the formation of a Freedom of Information Commission, as some individuals have suggested, would be a serious mistake. The Commission, if established, would simply be another bureaucratic proceeding which would inhibit the free flow of information to the public and to newspapers. Because newspapers operate under severe time constraints, to impose yet another delay in the information-gathering process would only defeat the original purpose of the Freedom of Information Act.

In this regard, we believe the Act should be self-operative, and enforcement should be through the courts rather than a Commission.

We commend your Committee's efforts to rectify the confusion situation which exists in obtaining information from government agencies. The problem



of devising specific language to improve the complex provisions of both bills before you is beyond the scope of our present analysis. However, we have great confidence in the ability and statesmanship of your Subcommittee in solving these problems in the public interest.

Although the Freedom of Information Act has become unwieldy and sometimes it has been used by agencies to retain more information than they dispense, we feel that legislation which eliminates some of the problems and opens up the government will surely be of benefit to the public and to newspapers.

With high esteem.

Sincerely yours,

STANFORD SMITH,  
*President.*

STATEMENT FOR THE ADMINISTRATIVE PRACTICE AND PROCEDURES SUB-COMMITTEE  
OF THE SENATE GOVERNMENT OPERATIONS COMMITTEE ON THE APPLICATION  
OF THE FREEDOM OF INFORMATION ACT BY THE DEPARTMENT OF DEFENSE AND  
ITS COMPONENTS CONCERNING REQUESTS FOR INFORMATION AND RECORDS BY  
THE DAILY OKLAHOMAN AND OKLAHOMA CITY TIMES

ORIGIN

When the My Lai Massacre first came to public attention in November 1969, we noted with dismay that many of the news reports carried confusing and conflicting statements and information about the incident and its participants. In an effort to shed additional light—hopefully from a better perspective—we decided on December 1 to ask for copies of certain Army records of the infantry unit involved that we knew to be unclassified.

Instead of promptly receiving the requested documents, we encountered the first of what was to be a continuing effort to maintain secrecy and perpetuate cover-up in violation of both the spirit and the letter of the Freedom of Information Act and the defense establishment's implementing directives. Over the years our experience has become a case study in bureaucratic obfuscation that has made a mockery of the Freedom of Information Act as applied—or misapplied—by the Department of Defense.

Probably never before have requests for information and records from the Department of Defense required such voluminous correspondence and generated so little in return. Mr. Jerry Friedheim, assistant secretary of defense for public affairs, testified before a House subcommittee on May 8 that correspondence on our requests is about four feet high and added: "If we spent as much time with everyone else as we do on Mr. Taylor's requests, we would not begin to satisfy our obligation to the public."

Of course that is fallacious since it is the defense establishment's unresponsiveness, deceit, deception and perpetual suppression of information and records legitimately available to the public that is the crux of much of the correspondence. And most of the time expended by Department of Defense officials in handling our requests can no doubt be attributed to continuous efforts to perpetuate the cover-up by finding ways to thwart implementation of the Freedom of Information Act.

It took repeated requests over a two and one-half year period before the first records we requested were ever released, and only then after 401 separate items of information were censored—an effort at further suppression that was later overturned on appeal to the Secretary of the Army. Those records raised more questions than they answered and led us to request even more records. And that led to even more intransigence on the part of supposedly responsible officials within the defense establishment.

Since official records can be an effective method of checking the credibility of the Pentagon Propaganda Machine, we have, during the past year, filed many more requests with the Department of Defense and five of its components for a variety of information and records on a number of subjects. Our experience has been much the same as that involving our requests for records pertaining to the My Lai Massacre. Put simply, Department of Defense propagandists don't want to risk exposure by backing up their statements with official records.

## FOI ACT

Mr. Robert W. Berry, the Army's general counsel, once wrote us: "Not only does the public need to know a vast amount about Government operations, but the Government must be assured that the public know. A lapse of public confidence in the Government that is based upon or results from suspicion of error, inefficiency or misconduct is a counterproductive to the Government's efforts to govern and to govern well as is the very existence of error, inefficiency or misconduct." Those are commendable words. But the record shows that the principle on which that statement is based—the principle embodied in the Freedom of Information Act—is ignored and flaunted on many occasions.

Requests for information and records we have sought from the Department of Defense and its components have been denied on 85 occasions—66 by the Army alone. Only 59 times have our requests been approved—30 by the Army. The Army also has granted partial approval to our requests in 20 other instances. Many of the approvals, however, are related to simple requests for basic publications, such as regulations, circulars and pamphlets, so that the disparity between denials and approvals for actual records is really much greater.

Currently, we have 110 requests for information and records pending with the Department of Defense and its components—86 with the Army. Some of the requests have been in that state of limbo for up to eight months, an inexcusable and possibly even deliberate delay designed to thwart the use of appellate remedies afforded by the Freedom of Information Act.

Six different exemptions in the FOI Act itself have been cited on 57 occasions in denying our requests for records from the Department of Defense and its components, primarily by the Army. The Army has cited FOI Act exemptions 43 times concerning our requests alone. That is more than three times the total number of FOI Act exemptions the Army told Congress it had cited in denying records to all requesters during the first four years of the administration of the FOI Act.

The exemption applied most frequently is the first, which protects the national security, although, as I will illustrate later in this statement, that exemption sometimes is applied simply as a ruse when court action is threatening to compel disclosure of records the Department of Defense would rather suppress, not for reasons of national security but rather to prevent national embarrassment.

The fifth, sixth and seventh exemptions governing inter- or intraagency memoranda, invasion of personal privacy and investigatory files for law enforcement purposes have been applied nearly as frequently and about equally. The other two exemptions cited in denying our requests are the second, covering internal personnel rules and procedures, and the fourth, protecting trade secrets. Curiously, the fourth exemption was cited only once, by the Army, when rejecting our request for disclosure of statements of financial interests filed by a number of high Army officials, including the secretary of the Army.

Taking the Army's reliance upon the FOI Act's exemptions as an example of how information and records can be suppressed by liberal interpretation of the Act—or its loopholes—to fit the Army's own improper and even illegal designs, it breaks down this way: On 10 occasions the Army has relied upon the first exemption on national security; three times on the second exemption on internal personnel rules; once on the fourth exemption, trade secrets; 12 times on the fifth exemption, inter- or intra-agency memoranda; nine times on the sixth exemption, personal privacy, and eight times on the seventh exemption, investigatory files. Attached to this statement is an appendix which includes two tables showing breakdowns, by defense components, on the handling of our requests and the application of the Freedom of Information Act's exemption as the bases for denials.

## PEERS REPORT

Perhaps the best example of the misuse of the Freedom of Information Act by the Army is in its various and often changing responses to our requests and appeals for release of the so-called Peers Report, the report of the Army's investigation into the initial cover-up of the My-Lai Massacre. We have sought release of the report for more than two years. The Army would specify release

was contingent upon one thing, then, when that position became untenable, yet another. Finally, the Army applied the national security cloak late in the game when it apparently feared a federal court might order disclosure.

General Peers himself expressed concern for "public recognition and acceptance of the objectivity of the inquiry and its effectiveness" in his memorandum of Nov. 30, 1969, to the secretary of the Army and the Army chief of staff. It is nothing less than an Orwellian twist to subsequently suppress the Peers Report and destroy an opportunity to build just such recognition and acceptance.

Continued suppression of the full Peers Report is clearly unwarranted in view of the public release of large portions of the material contained in each volume. The secretary of the Army, in his memorandum of July 3, 1970, to the Judge Advocate General, authorized declassification of statements, exhibits and testimony obtained by the Army Criminal Investigation Division and the Peers Inquiry. Not only was such declassification authorized, but it is strongly recommended by no less than every commanding general who was a general court-martial convening authority for a trial relating to the My Lai Massacre, according to Brig. Gen. Harold E. Parker's letter of Aug. 7, 1970, to the commander of the U.S. Military Assistance Command, Vietnam, in which he refers to recommendations by the commanding generals of the First U.S. Army at Fort Meade, Maryland; the Third U.S. Army at Fort McPherson, Georgia; the First Armored Division at Fort Hood, Texas, and the U.S. Army Infantry Center at Fort Benning, Georgia.

The public records of trial in the general courts-martial related to the My Lai Massacre, on file with the U.S. Army Judiciary at Falls Church, Virginia, contain thousands of pages of Peers Report material, making suppression of the remaining portions of the Peers Report not only improper but illogical. Just in the record of trial of Col. Oran K. Henderson, the last completed and filed on Sept. 12, 1972, there are more than 3,600 pages of direct Peers testimony from more than 100 witnesses contained in Volume II of the Peers Report; more than 100 documents contained in Volume III of the Peers Report, and nearly 100 CID reports, summaries and witness statements from Volume IV of the Peers Report. Other public records of trial in other My Lai cases contain even more material from those three volumes.

In addition, the substance of the findings, recommendations and conclusions contained in Volume I of the Peers Report became known through the multiplicity of charges brought at the conclusion of the inquiry, through testimony and evidence presented at the various trials, through release of a censored version to the public, and through reporting in the press based on a copy of Volume I obtained surreptitiously.

Since our initial request for release of the full Peers Report on March 31, 1971, the Army has taken a variety of positions characterized by inconsistency. The Army has changed and broadened its justification for continued suppression as previous position became untenable. The latest basis for denial is couched in four exemptions in the Freedom of Information Act: national security, inter-agency memoranda, personal privacy and investigatory files.

Originally, the Army denied release of the report simply pending conclusion of the My Lai trials. After the last trial, the Army shifted ground and continued to deny release of the report on grounds it was an investigatory file compiled for law enforcement purposes despite a memorandum from the secretary of the Army and the Army chief of staff directing General Peers that his inquiry was specifically not an investigation for law enforcement purposes.

Finally, on June 15, 1972, the Army added national security as a justification for withholding the report from the public when the Army's general counsel simultaneously answered our appeal and responded to litigation then in progress in federal court in the District of Columbia. Even General Peers, himself, did not claim national security as an exemption when he first ordered the report kept under wraps. That was obviously added when litigation threatened to force disclosure, since the Army no doubt was aware that the courts have been reluctant to even read classified information in camera, much less order disclosure of anything the military claims has been classified in the interests of national security or foreign policy.

While the legal position of the Department of the Army was upheld by the United States District Court for the District of Columbia in *Aspin v. Department of Defense*, Civil Action No. 632-72 (D.D.C.), on Aug. 22, 1972, that



decision was rendered before the filing of the Henderson record of trial which reveals much of the material the Army sought in court to keep secret. That subsequent action by the Army, it would seem to follow, thus nullified the protective secrecy afforded by the court decision.

In addition, it is obvious from the simple errors in fact contained in the Memorandum Opinion and Order in the case of *Aspin v. Department of Defense* that the district court was, at best, clearly unfamiliar with the subject with which it was confronted, and, at worst, the victim of a fraud upon the court by the Army in conveying false or misleading information about the Peers Report such as the erroneous conclusion on the number of books which comprise the report and the erroneous conclusion that the proceedings against Lt. William L. Calley resulted from the Peers Inquiry).

It is clear from the delay of more than two years before the Army added the national security exemption to its justification for suppressing the report that such a maneuver was merely intended to enhance its position before the court by invoking the only exemption under the act on which the courts have traditionally been reluctant to overrule.

The mere fact that material is classified is not grounds for continued classification in the interests of national security or foreign policy if justification for such classification did not exist to begin with. Portions of the Peers Report now a part of the public records of trial clearly illustrate that classification in the interests of national security or foreign policy is unwarranted, particularly since most of that material shows that it was never classified to begin with. The downgrading on each page of the material now a public record shows very little was originally classified as CONFIDENTIAL, while most was simply marked 'For Official Use Only' which is not a valid classification under provisions of Presidential Executive Order 11652.

The second exemption the Army claims justifies withholding the Peers Report—that involving inter-agency memoranda—clearly doesn't apply since the report was adopted as the decision of the Peers Inquiry and was publicly stated to be the decision, plus formed the basis for various actions, including criminal charges against soldiers, thus meeting the test for disclosure as embodied in *American Mail Line v. Gulick* (411 F. 2d 696, 703, 704 (D.C. Cir. 1969)). The court's decision in the American Mail Line case also reinforced provisions of the Freedom of Information Act which provide that disclosure is required to "any person" regardless of his purpose or need and that "(A)ppellants lack of need for the memorandum is irrelevant to their right to obtain it under the Act."

The third exemption cited by the Army, that involving personal privacy, is clearly unjustified, in part by the Army's own precedent in reversing its decision to withhold information originally censored from the first records we requested in connection with the My Lai Massacre, and by the public release through attachment to various records of trial of voluminous material from the Peers Report to which that exemption had previously been applied.

The application of that exemption to Volume I of the Peers Report is also without foundation since that volume contains more broad-based material than information relating to individuals, and since that information which does pertain to individuals (such as allegations of wrongdoing) already has become public knowledge through the filing of criminal charges and subsequent court-martial proceedings. As the attorney general's memorandum notes: "(T)he applicable definition of 'person' which is found in . . . the Administrative Procedure Act would include corporations and other organizations as well as individuals. The kinds of files referred to in this exemption, however, would normally involve the privacy of individuals, rather than of business organizations."

It also has been irrefutably established that a government agency is not called upon to consider its interests when deciding whether to release information it may consider to fall under the protection of this exemption, but must consider only the personal privacy of the individual concerned and even then, the test is not simply whether an invasion of privacy might occur, but whether there would be a clearly unwarranted invasion of personal privacy. It should be obvious that if any invasion of privacy has occurred, it has been at the initiation of the Army through the various proceedings relative to the My Lai incident and the public release of the material related thereto. To argue there would be a further invasion of personal privacy through the public release of the full Peers Report is not only inconsistent with the Army's own precedents, but is illogical.

The fourth exemption cited as justification for suppressing the report, that involving investigatory files, also is not applicable by the Army's own precedents, not the least of which is the public release of a large part of the report, most notably the CID reports, summarizes and witness statements. The Peers Report cannot justifiably be classified as an investigatory file compiled for law enforcement purposes, as required by law to meet the test for non-disclosure. This is clearly evident by the secretary of the Army's and the Army chief of staff's memorandum of Nov. 26, 1969, to General Peers which constituted the directive for the investigation and ordered: "The scope of your investigation does not include, nor will it interfere with, ongoing criminal investigations in progress."

This was amplified repeatedly by General Peers and his assistants in recorded testimony during Peers Inquiry hearings which lead irrefutably to the conclusion that despite the criminal charges brought subsequent to the Peers Inquiry, the Peers Report itself constituted no more than background information and the real investigatory files were compiled by subsequent investigations by the Army's CID.

General Peers, himself, stated during the recorded testimony on Dec. 5, 1969, that: "This investigation was directed jointly by the secretary of the Army and the chief of staff of the United States Army for the purpose of determining facts and findings and recommendations concerning (1) the adequacy of the prior investigations, inquiries into the reviews and reports within the chain of command of what is now commonly referred to as the My Lai Incident of 16 March 1968 and (2) possible suppression or withholding of information by any person who had a duty to report and to furnish information concerning this incident. This investigation is not being conducted to investigate all the facts and circumstances of what happened at My Lai. It is directed for those purposes which I have just stated."

Col. Robert E. Miller, Peers' assistant, amplified those remarks during additional recorded testimony on the same date when he stated: "We are not directly concerned with whether war crimes or crimes against the laws of war or offenses in violation of the Uniform Code of Military Justice were committed at My Lai (4) on 16 March 1968. However, we must necessarily inquire into the events of March 1968 at My Lai in order to conduct the investigation ordered by the secretary of the Army and the Army Chief of Staff."

Even if the Peers Report were accepted *prima facie* as an investigatory file compiled for law enforcement purposes it does not meet the test of *Cooney v. Sun Shipbuilding and Drydock Co.* (288 F. Supp. 708, 712 (E.D. Pa. 1968)) because the Peers Report has lost all relevancy in any proceeding whatsoever related to the My Lai incident, and, in fact, the Army has stated that no further actions are contemplated. In the *Cooney* case, the court held that the purpose for which the file was originally compiled was not as important as the question "(W)hether they (files) retain that characterization over four and one-half years after their compilation] It is not argued by the government that there is contemplated any law enforcement proceedings. . . nor is it alleged that the information originally gathered by officials. . . ever culminated in any proceedings. . . The question then arises whether the files once classified 'investigatory files' may forever after retain that characterization so as to be immune from disclosure under the statute." That doctrine clearly establishes that there is no justification for continued suppression of a file merely upon its identification initially as investigatory-type records.

#### OPERATIONS JOURNALS

Probably an even clearer example of the Army's misuse of the Freedom of Information Act in connection with the fifth exemption, inter-agency memoranda, is in connection with our request for Tactical Operations Center Journals of the division, brigade and task force responsible for the My Lai massacre. We first requested copies of the journals on April 21, 1972, and were told on the following—June 15 that our request had been approved and copies would soon be provided to us. Then the Army's lawyers got into the act.

When the Army initially undertook to review the journals and recommend declassification, the office of the Deputy Chief of Staff for Operations-Pacific, was apprehensive about releasing only selected entries on a handful of journals, plus the entire journal from the brigade on the day of the massacre itself. Unknown to the Pentagon declassifiers, however, the very journals they

expressed apprehension about had already been declassified and attached to the trial records during the My Lai courts-martial.

Finally, we sent copies of the declassified journals to the Army to prove they had declassified with one hand what they were continuing to suppress with the other in the hope that might jar loose the total package, especially since there had been a recommendation for declassification of the others that was held up pending the review of the few journals they were worried about.

Then the Army's general counsel decided that none of the journals could be released, citing the inter-agency memoranda exemption as well as the second exemption governing internal personnel rules and practices. The fallacy of that decision lies in the Army's own reasoning that such protection is required to maintain the integrity and candor of advice, judgments and opinions of staff officers within the Army. The journals did not contain any such exchange, but merely recorded events that transpired during operations. In addition, every officer involved has long since moved on to other jobs and every unit involved no longer has long since departed Vietnam but has even been disbanded and no longer exists, even on paper.

#### SUMMARY

There are many, many more examples I could cite of cases in which we have been involved with the Department of Defense and its components that involve abrogation of the Freedom of Information Act, overzealous classification and a super-penchant for secrecy at any cost, but this statement already is too long. Suffice it to say that the defense establishment, in particular the Army, spends its time and effort trying to find ways to suppress information rather than to make it available to the American people as the law requires.

When all else seems to fail, they, as many other federal agencies, turn to exorbitant fees for research and the like in an effort to thwart release of the material. This is clearly evident on the Army's part since it has charged us for material for which it originally levied no assessment, and since it levied the first research fee ever assessed by the Army against a news media organization in connection with one of our requests, according to one of their own spokesmen.

Probably the clearest indication of all on the use of exorbitant fees as a means of circumventing the FOI Act is the decision by the Army and the Department of Defense on our challenge to such assessments. We claimed exemption under military regulations which exempt news media from such charges. Their rulings upheld the assessments by declaring that we were not a news media providing information to the public in the interests of the Armed Forces.

There are four critical weaknesses in the current Freedom of Information Act. The first involves the broad exemptions which create enough loopholes that a determined bureaucrat can withhold practically any document he wants from the public by claiming it fits into one of the general categories of exempt material. The second involves the lack of any compulsion for judicial review of material said to be classified in the interests of national security or foreign policy. The third involves the lack of any requirement to respond to requests for information and records within a reasonable length of time, permitting unnecessary footdragging and deliberate delays. Finally, the fourth involves the lack of precise limitations on the type and amount of fees that may be assessed, leading to a variety of disparities within the federal agencies and an ability to charge high research fees that are not really cost-related.

It is beyond the scope of this statement to offer any recommendations for remedying some of the problems inherent in the administration of the Freedom of Information Act, as now written. Rather, I had hoped to pinpoint some of the most apparant problems—problems with which you are no doubt aware—and illustrate those problems by our own experience. If the present inequities in the Freedom of Information Act are not corrected, the government will continue to suppress information to which the public is legitimately entitled while giving mere lip service to the principles embodied in the Freedom of Information Act. Such secrecy will merely cover-up and perpetuate the kind of mistakes, embarrassments and illegal acts that have been hidden all too long and which are leading unmistakably and irrevokably away from the democratic principles on which our republic was founded.

JACK H. TAYLOR JR.

*Special Assignments Investigative Reporter,  
The Daily Oklahoman and Oklahoma City Times*



## APPENDIX

## REQUESTS FOR INFORMATION, DAILY OKLAHOMAN AND OKLAHOMA CITY TIMES

[Dec. 1, 1969, to June 8, 1973]

	USA	USN	USAF	USMC	DCAA	DOD	Total
Requests denied.....	66	5	5	1	1	7	85
Requests granted.....	30	7	8	2	3	9	59
Requests partially granted.....	20	0	0	1	0	0	21
Requests pending.....	86	4	3	4	0	13	110
Appeals denied.....	14	0	0	0	0	0	14
Appeals granted.....	6	0	0	0	0	0	6
Appeals partially granted.....	0	0	0	0	0	0	0
Appeals pending.....	10	1	2	1	1	2	17
FDI Act exemptions cited as basis for denial							
552(b)(1).....	10	2	2	0	1	4	19
552(b)(2).....	3	0	0	0	0	0	3
552(b)(3).....	0	0	0	0	0	0	0
552(b)(4).....	1	0	0	0	0	0	1
552(b)(5).....	12	0	0	0	0	0	12
552(b)(6).....	9	1	0	0	1	1	12
552(b)(7).....	8	0	0	0	1	1	10
552(b)(8).....	0	0	0	0	0	0	0
552(b)(9).....	0	0	0	0	0	0	0
Total.....	43	3	2	0	3	6	57

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE,  
Washington, D.C., August 15, 1973.

HON. EDWARD M. KENNEDY,

Chairman, Subcommittee on Administrative Practice and Procedure, Committee  
on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR KENNEDY: Secretary Schlesinger has asked me to respond to your invitation to comment on a statement received by the Subcommittee on Administrative Practice and Procedure from Mr. Jack Taylor, a reporter for The Daily Oklahoman-Oklahoma City Times. In his statement, Mr. Taylor is critical of the performance of the Department of Defense, particularly the Department of the Army, in answering his requests for records under the Freedom of Information Act (FOIA).

Because much of Mr. Taylor's detailed criticism is based on his requests for Department of the Army records, the Army has prepared a general chronology and background of its relationship with Mr. Taylor in the hope that it will be of interest to your subcommittee in assessing his comments. The Army's experience with Mr. Taylor raises important implications for the overall implementation and administration of the FOIA by reason of the sheer volume of material requested and the resources devoted to responding to these requests.

Several points ought to be particularly noted with regard to the Army's experience in responding to Mr. Taylor's requests.

(1) With respect to the Peers Report, conflicting legitimate interests are involved. Whether these records should, as a matter of policy, be disclosed despite the applicability of FOIA exemptions, is, of course, a matter of judgment. In its exercise of judgment, the Army has concluded that the legitimate interest served by invoking the applicable exemptions outweighs the interests that might be served by the disclosure of the Peers Report. The U.S. District Court has confirmed the Army's position that release is not required by the Act, and the case is currently on appeal.

(2) The difficulties experienced by the Army in processing the considerable correspondence for Mr. Taylor is regrettable, but not surprising. This unprecedented series of requests from a single source was not anticipated when the machinery for processing FOIA requests was developed. The processing of requests in this kind of situation will improve with greater experience.

(3) It is fair to say that, to a significant extent, many of Mr. Taylor's apparent concerns stem from his basic disagreement with decisions to release

or not to release various records he has requested. He would understandably be less critical if his requests resulted in disclosure with greater frequency than at present. Yet the FOIA applies to every record held by the Department of Defense. While Mr. Taylor has the right to request each and every record he has thus far requested, he is not necessarily entitled to disclosure of a requested record simply because he or any other member of the public believes the information ought to be disclosed. Once a decision is made that a legitimate and significant purpose exists to withhold a particular record that has been requested, and that it should be withheld, if possible, the applicability of one or more exemptions is a question of law. While the Army has complete confidence in the resolutions of these requests that have thus far been rendered, differences in interpretations concerning the Act (differences which exist even among courts) are bound to arise, and are, of course, a fairly common consequence of agency experience with any statute requiring action in certain circumstances and permitting different action in other circumstances.

To gain an appreciation of the volume of the *Oklahoman's* letters and some of the far-reaching substantive issues that are raised by Mr. Taylor's requests, the Department of the Army would be eased to have you and other members of the Subcommittee or any members of your staff examine its correspondence with Mr. Taylor or other representatives of that newspaper.

It is apparent from Mr. Taylor's statistical summary of his FOIA requests to the Department of Defense that the Navy, the Air Force, the Defense agencies, and the Office of the Secretary of Defense have not received a volume of requests for records comparable to that of the Army. Nevertheless, with respect to the Office of the Secretary of Defense (which he describes as the Department of Defense), our records indicate that between February 12 and August 6, 1973 (Mr. Taylor's statistics are through June 8, 1973), the relatively small number of requests involve 270 documents. In a single letter, which Mr. Taylor apparently considers a single request, he has frequently sought a large number of documents of varying length and complexity, each of which may require separate evaluation under the FOIA. Of the documents requested from the Office of the Secretary of Defense, 118 have been provided and only nine refused; 113 are currently being evaluated, and 16 require additional description before we can identify them.

This experience in the Office of the Secretary of Defense has raised the same kinds of issues that have troubled the Army as to the allocation of resources to a single representative of the news media, and the adequacy of our own procedures to cope with a multitude of seemingly random requests within a reasonable period of time, using existing manpower and other resources available for this purpose. In this regard, we wish to emphasize that the responsibility for evaluating documents frequently, if not generally, must be borne by a single individual within the agency because he is the only one sufficiently knowledgeable about the subject matter of its contents to give a reasonable judgment. These documents are often voluminous, and the reviewer must set aside his other regular duties to accomplish the FOIA assessment. Consequently, it should not be surprising that despite the large total budget of the Department of Defense and its total number of employees that these evaluations frequently take longer than we would prefer. This should be taken into account when evaluating statutory time limits for responding to FOIA requests.

I have not endeavored to respond to every allegation or criticism made by Mr. Taylor in his analysis of the implementation by the Department of Defense of the FOIA. Needless to say, we do not agree with his sweeping conclusion to the effect that responsible officials of this Department are devoted to thwarting the purposes of the FOIA. Disagreement with Mr. Taylor probably stems, at least in part, from the different perspective with which we view requests under the Act. His perspective, that of a news reporter, is of course, heavily influenced by his appreciation of the importance of exposing all possible information so that the public can be more fully informed about the operations of Government agencies. Our perspective requires that we weigh against this very important objective, our responsibility to protect individual rights of privacy, national security, proprietary interests, the effect on the operations of the agency, effective and fair investigations of alleged wrong-doing, and other factors recognized by Congress in its provision of exemptions from the general requirement that Government information be made available to the public. The

balancing of these interests is far more difficult than Mr. Taylor appears to appreciate. It is our hope that we can convince him, your committee, and other interested committees in the Congress that we are exercising this responsibility for the balancing of legitimate interests in a conscientious manner that meets the intention of the FOIA both in spirit and letter.

Sincerely yours,

L. NIEDERLEHNER,  
*Acting General Counsel.*

Enclosure.

CHRONOLOGY AND BACKGROUND OF THE DEPARTMENT OF THE ARMY RESPONSES  
TO THE DAILY OKLAHOMAN REQUESTS FOR INFORMATION

The earliest recorded information request from the Daily Oklahoman was submitted in December, 1969. This was approximately the same time that then Secretary Resor and Army Chief of Staff General Westmoreland directed LTG Peers to conduct an inquiry into the My Lai incident. The request was for the morning reports of several units that were involved in operations in and around My Lai at the time of the incident. Because of the Army's interest in protecting the privacy and other rights of individuals who were likely to be called as witness in the pending or future investigations, the request was denied. Shortly thereafter, Mr. Taylor requested additional morning reports for other units thought to have been involved in the incident. This was also denied. With each denial, Mr. Taylor was advised of his right to appeal the decisions to the Secretary of the Army. No appeal followed until several years later, as described below.

In the spring of 1971, at about the same time the court-martial of Lieutenant William Calley was concluding and approximately one year after LTG Peers submitted his Report on the incident to the Secretary and to the Chief of Staff, Mr. Taylor renewed his efforts to obtain information pertaining to My Lai. A new expanded request for morning reports and a request for release of the Peers Report were submitted. These requests were denied for the reasons stated previously, since other related court-martial proceedings were then pending. In the meantime, the Army had released to the public a partial version of the Peers Report. In addition, as various My Lai-related courts-martial resulted in open trials, which were widely reported, the public became increasingly informed of the detailed evidence about My Lai.

At the end of December, 1971, Mr. Taylor again requested release of all the morning reports previously sought as well as the Peers Report. Several members of Congress also called upon the Army to release the full Peers Report. On 28 January 1972, Secretary Froehle announced at a press conference that the Army would not release the Peers Report as long as appellate reviews relating to My Lai actions were pending, but would consider the issue of its release once all such reviews had terminated.

In March, 1972, the Adjutant General released to Mr. Taylor the requested morning reports, deleting a number of entries containing personnel information that was thought to be personal in nature, such that its release would invade the subject's privacy. Since the Army General Counsel had just previously denied to Congressman Aspin release of the Peers Report, citing Freedom of Information Act justifications, the Report was denied to Mr. Taylor by The Adjutant General.

At this juncture, Mr. Taylor's apparent interest in My Lai stimulated additional requests for records and information, besides morning reports and the Peers Report. The Office of the Chief of Information (OCINFO) was designated as a point of contact for Mr. Taylor's requests for information. Requests for such things as chronological histories, Daily Staff Journals, additional morning reports, assignment data and personnel (and personal) information on over sixty second lieutenants, inspector general reports, all for My Lai-related units and matter, began to arrive on a week-to-week basis in OCINFO, during last spring and summer. During this same period, OCINFO officials began to receive phone calls, sometimes several times a day, from Mr. Taylor. In the course of these calls, the written requests were augmented, modified and discussed as to status and progress. (Eventually, Mr. Taylor was asked to submit all requests for records in writing, a practice with which there has been substantial compliance.) Letters reciting understandings thought to be reached in



calls and referring to previous conversations followed. It became no exaggeration to say that for several information officials, a good part of their working day was spent (as it is now) on matters involving the *Oklahoman* and Mr. Taylor's requests tracking down information requested, attempting to obtain determinations of releasability, and drafting correspondence to forward the information or explain why it could not be obtained and/or released. Because a number of these written and telephoned requests did not involve identifiable records, but concerned information about personnel, dates, claims, or Army policy, locating the answers, if known, was quite an undertaking, especially in view of the ever increasing volume of the requests. Response time inevitably lagged, administrative difficulties were compounded, and the newspaper became more impatient and distressed. In May, 1972, the newspaper formally appealed to the Secretary for release of the deleted entries in previously disclosed morning reports and for the entire Peers Report. In June, 1972, the Army General Counsel ruled that the newspaper was entitled to the morning reports in their entirety but denied the Peers Report.

It should be noted that Mr. Taylor's first formal appeal to the Secretary of the Army for release of the Peers Report occurred *subsequent* to the filing of Freedom of Information Act litigation in the United States District Court for the District of Columbia by Congressman Aspin, who claimed that the Army was improperly withholding the Report from the public. While the Army General Counsel cited and explained the Freedom of Information Act justifications in the denial to Mr. Taylor, he also cautioned that the pendency of litigation on that precise issue made it inappropriate to respond in detail to the newspaper's arguments for release of the Report. Nevertheless, eight days later, the newspaper again appealed to the Secretary seeking to have the Peers Report released. This appeal was also denied. In August, 1972, the federal district court held in the *Aspin case* that the Army was not improperly withholding the Peers Report from the public. Notwithstanding, the newspaper forwarded a lengthy legal brief protesting this decision in a third appeal to the Secretary of the Army in October. The next month the Army General Counsel again denied the appeal, informing Mr. Taylor that Congressman Aspin had filed a notice of appeal, thereby protracting litigation over release of the Peers Report. The case is currently on appeal before the United States Court of Appeals for the District of Columbia Circuit. Briefs for both sides have been filed.

In addition to morning reports, the Peers Report, and home of record information, Mr. Taylor's formal appeals to the Secretary under the Freedom of Information Act for release of records have included My Lai-related Daily Staff Journals, the expenses of proceedings held as a result of My Lai, chronological histories of certain units, units of assignment for several individuals, information about other My Lai investigations, the names of those general officers on active duty requesting voluntary retirement, and a joint British and American file, known as "Operation Keelhaul", concerning repatriation of World War II prisoners.

At the beginning of last summer at a point relatively early in these developments, Mr. Taylor wrote directly to the Secretary's attention alleging that information officials were derelict in processing the newspaper's requests. The Army General Counsel thereupon inquired on behalf of the Secretary and reported to the *Oklahoman* that there was "no evidence whatever that any Army official responsible for processing your requests has in the past either intentionally or negligently failed to attempt to administer Army information policies in as even-handed and in as thorough a manner as possible."

While information officials in OCINFO continued to work on the initial processing of *Oklahoman* requests, the volume, and the areas of interest began to mount.

Between 1 July 1972 and 1 August 1973, information requests from the *Oklahoman* directed to OCINFO included, but were not limited to, the following:

- (1) biographical data for and the Vietnam assignment of LTG Peers and his relationship to Operation Phoenix;
- (2) maps of Quang Ngai Province and My Lai)
- (3) an after action report on "secret training of . . . Cuban nationals" in 1962 as contingency plans for the Cuban missile crisis;
- (4) access as unofficial historical researcher to classified file on "Operation Keelhaul," relating to repatriation of Russian POWs following World War II;

- (5) listing of all civilian requests for Army records and actions taken since 1967;
- (6) request for MACV directives, orders, SOPs from late 1960's;
- (7) names of individuals against whom administrative action relating to My Lai was considered, standards of performance in such actions, memoranda of law in each case;
- (8) five-page list of testimonial exhibits in the publicly available *Henderson* court-martial record;
- (9) Criminal Investigation Division (CID) reports in *Henderson* court-martial record;
- (10) CID investigation report in pending war crimes investigation;
- (11) Defense Intelligence Collection Manual and Army subject schedules for courses of instruction in agency handling and counter-intelligence interrogation; records of investigations for certain military intelligence group;
- (12) MACV directives on Operation Phoenix (directed to the Department of Defense);
- (13) studies of an officer's performance in a particular assignment associated with My Lai;
- (14) six-page list of documents in *Henderson* court-martial records;
- (15) My Lai-related intelligence summaries, monthly reports, interrogation and operations reports;
- (16) review of classified portion of court-martial record;
- (17) information re *Calley* appeal, such as biographical data on judges, dates, facilities;
- (18) information and records re enlisted man claiming adverse personnel action;
- (19) chronological list of war crimes investigated by Army since 1965;
- (20) information re possible exhumation of graves at My Lai;
- (21) over two-hundred eighty Army publications, such as regulations, pamphlets, technical manuals;
- (22) Inspector General reports relating to My Lai;
- (23) personnel and budget information about OCINFO;
- (24) list of debarred, ineligible or suspended contractors;
- (25) indices to *Federal Register*, court-martial reports, procurement regulations;
- (26) personnel data re officers assigned to OCINFO;
- (27) information re investigations of personnel at New Orleans Recruiting Station;
- (28) information re confinement and parole of Lieutenant Calley;
- (29) information re Brownsville incident;
- (30) unofficial historical researcher status for access into My Lai records;
- (31) the personal schedule of the Army Chief of Information;
- (32) file biographies and official photographs of general officers in the Army (request later reduced to over 180 specifically named Army generals);
- (33) composition, number of meetings, action taken, and reports concerning Army Classification Review Committee;
- (34) declassification reviews of over 100 documents;
- (35) latest summary report of Reserve training attendance;
- (36) latest summary report of accessions under Army Reserve and Procurement Program;
- (37) statements of financial interests on key Army civilian officials;
- (38) Department of the Army letter (SECRET) on management of Nuclear, Chemical and Biological munitions;
- (39) names and duty assignments of Army Senior officers on flying status;
- (40) Quarterly Reports on Military Personnel in Southeast Asia;
- (41) request for information on General Haig's status;
- (42) reports on non-industrial facilities for mobilization;
- (43) reports on Military Assistance Programs in Vietnam and Cambodia;
- (44) Army unit assignments in Southeast Asia;
- (45) data on 1973 Army Brigadier General Selection Board;

- (46) Morning Reports on all Special Forces Units in Thailand from 27 January to 1 June 1973;
- (47) technical papers on Foreign relations and Foreign policy regarding Burma, Cambodia, Indonesia, Malaysia and Asian regionalism;
- (48) fifteen classified after-action reports and Operational Reports of Lessons Learned from SEA;
- (49) Army Evaluation Report on the C-5A;
- (50) copy of the list of Army officers designated to exercise original classification authority;
- (51) five classified Field Manuals and four classified Technical Manuals;
- (52) Army response to a Presidential memorandum;
- (53) copies of affidavits filed in Article 32 investigations;
- (54) information on violations of UCMJ by any member of the Army while in POW status;
- (55) twenty-six Joint Tables of Allowance for Military Advisory Groups around the world;
- (56) Army incendiaryism data from 1966 to present;
- (57) over fifty Army reports to the Department of Defense;
- (58) requested whether the Army was doing or had done business with any of the 17 private corporations located in Georgia;
- (59) requested the charge sheet, court-martial orders, mitigation and current status on Capt. John J. McCarthy plus status on any war crime allegations against members of the 5th Special Forces;
- (60) copy of after mission report of Mobile Training Team CX-146 in the Congo, July 1964.

Between 1 March 1972 and 1 August 1973, these requests, ones cited previously, and others have been contained in over 240 pieces of correspondence from the *Oklahoman*.

Within the past year a related issue has developed over the matter of charging fees for research and reproduction costs in connection with the *Oklahoman's* requests. In a decision that was fully coordinated with the Department of Defense, these charges have been assessed according to the schedules adopted in Department of Defense Instruction 7230.7, and Army Regulation 37-20. Most recently, the newspaper has argued that while the reproduction fees may be valid, the research fees are not. This matter was again studied, and it was determined that the assessment of fees for searching of records as well as for reproduction to be fair, supported by the application directive and regulation, and consistent with both sound business practice and the congressional interest that service to special beneficiaries be self-sustaining to the fullest extent possible. In this regard, the so-called User Charge statute (31 U.S.C. 483a) is authority for such an interpretation.



## S. 1142—TO AMEND THE FREEDOM OF INFORMATION ACT

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TUESDAY, JUNE 26, 1973

U.S. SENATE,  
SUBCOMMITTEE ON ADMINISTRATIVE  
PRACTICE AND PROCEDURE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 9:20 a.m. in room 3302, Dirksen Office Building, Senator Edward M. Kennedy (chairman of the subcommittee) presiding.

Present: Senators Kennedy (presiding), Thurmond, Muskie and Chiles.

Also Present: Thomas M. Susman, Assistant Counsel, and Ann Landman, Staff Member, Subcommittee on Administrative Practice and Procedure; Alvin From, Staff Director; Alfred Friendly, counsel; Lucinda Dennis, chief clerk; Elizabeth A. Preast, secretary and Dorothy J. Kornegay, secretary, Subcommittee on Intergovernmental Relations.

Senator KENNEDY. The meeting of the Joint Subcommittees of Separation of Powers, Intergovernmental Relations and Administrative Practice and Procedure will come to order.

If yesterday's testimony at the caucus room teaches us anything, it demonstrates beyond debate that Government secrecy breeds Government deceit, that executive privilege nurtures executive arrogance, that national security is frequently the cover for political embarrassment, and that the best antidote to official malfeasance, misfeasance, and nonfeasance is the sunshine and fresh air of full public disclosure of official activities.

High Government officials sat around in the Attorney General's office calmly discussing the commission of bugging and mugging and kidnapping and blackmail. How could they do this? They all thought that they would always be able to plead that any disclosure of their deliberations would intrude upon executive decisionmaking, and thus inhibit Federal employees in the future from giving free and frank advice to people like the Attorney General.

I don't buy that. If disclosure is going to inhibit that kind of advice, then let's have more disclosure. If Federal employees doing the public's business are making suggestions in private that they wouldn't want the public to know about, then they ought to be inhibited. If they don't think their activities can withstand public and congressional scrutiny, then maybe there is something wrong with the activities, not the scrutiny.

Federal employees planned and committed a burglary on the office of the psychiatrist of a defendant in a pending criminal case. How could they possibly think they could get away with that? They knew that the broad cloak of national security would be thrown over everything they did and said. Merely because the object of their adventure was someone connected with an attenuated national security tie, they could believe that all the usual rules were suspended—no laws, no constitution, no ethics, no limits on them at all.

Well, I don't buy that either. My experience has been that abuse of the national security concept, whether in the field of classified documents, or oil imports, or wiretapping, has time and again proved to be one of the greatest threats to the real security of the Nation.

White House staff maneuvered to obstruct congressional and FBI investigations and to cover up the facts from public view. How could they feel secure in this course of action? They found comfort behind the all-encompassing shield of executive privilege which they themselves fashioned to resemble a principle of constitutional magnitude. Meetings with the President were contemplated to further legitimize this defense, and ultimately even these were deemed unnecessary when the Attorney General articulated before these committees an executive privilege doctrine that would protect even a former janitor of the executive branch.

Members of the President's party in Congress couldn't swallow that one. Congress can be a reasonable partner in Government when it comes to protecting privacy or national defense. But congressional oversight and legislative functions cannot be kept in check by the whim of executive branch officials, and abuses of executive powers cannot be hidden behind the cloak of separation of powers.

We cannot eliminate the Watergate mentality from our Government until we eliminate the atmosphere of secrecy on which it has fed and the specific tools of evasion and dissembling on which it relies.

Congress thought it was achieving this when it passed a law called the Freedom of Information Act, which we thought established a clear rule that everything inside the Federal Government is in the public domain with a few narrow exceptions which were only to be invoked in specific cases where there was a compelling reason to do so.

Instead, we find agencies almost daily using the act as a shield to fend off more and more legislative inquiries. We even find officials citing the act as a defense to congressional inquiries which the law specifically says are not controlled by its terms.

Federal officials who want their activities to remain hidden from public view are going to have to tell us why, and their reasons are going to have to be very convincing and very specific.

Senator THURMOND?

Senator THURMOND. The only thing I have, Mr. Chairman, is I would be glad to hear from Mr. Richardson.

Senator KENNEDY. I am looking forward to hearing from the Attorney General. Let me say at the outset I have made inquiry of the

Attorney General, as I have of his predecessors, on a number of different matters of interest to our subcommittee. One of those is the Kent State investigation, and I see from correspondence from the Attorney General that the Justice Department is taking a new look at the collection of the evidence and is reviewing that situation.

Mr. RICHARDSON. That is correct, Mr. Chairman, the review was initiated before I took office as Attorney General by the Assistant Attorney General in charge of the Civil Rights Division, Mr. J. Stanley Pottinger and it is still ongoing.

I have been filled in on it and hope to be able to reach an independent judgment some time before long.

Senator KENNEDY. And we had also requested certain documents relating to antitrust matters, and some of those interagency communications were made available to us. And then as I understand, there has been a transfer of some of those documents from the *ITT* cases to the special prosecutor.

Mr. RICHARDSON. That is correct.

Senator KENNEDY. I was advised that if I wanted to see those documents now I would have to negotiate with the special prosecutor.

Mr. RICHARDSON. That of course is the corollary of the guidelines with which you have become, I believe, very familiar.

Senator KENNEDY. And then, as to the FBI manuals which the Constitutional Rights Subcommittee—Senator Ervin and myself in one of the hearings had been interested in, your response is that should a special oversight committee on the FBI be established, you would work out some arrangements to make the materials available to such a committee.

Of course, we haven't set up such an oversight committee by the parent Judiciary Committee. I don't to my own knowledge have any idea whether such will be established, but the Subcommittee on Administrative Practice has been the only one to date that has been concerned about the investigative practices and procedures of the Bureau. But that is indicated as your position in the communication. I do want to indicate that the response I received has been the most forthcoming one that I have received from the Justice Department in some time and I want to express that for the record.

[The letter from the Attorney General to Senator Kennedy follows:]

OFFICE OF THE ATTORNEY GENERAL.

*Washington, D.C., June 25, 1973.*

HON. EDWARD M. KENNEDY  
U.S. Senate,  
Washington, D.C.

DEAR SENATOR KENNEDY: This is in reply to your letter of April 25, 1973, to my predecessor requesting access to several documents, memoranda and reports in the possession of this Department. I have carefully considered your requests in the light both of the responsibility of the Congress for obtaining information necessary to the discharge of its legislative functions and of my responsibility for ensuring that the duties of the Department of Justice can be effectively discharged. A spirit of comity, resting on rational understandings, has traditionally governed this area and has generally prevented serious conflicts between the legislative and administrative responsibilities and their respective



imperatives. I shall therefore try to explain as clearly as I can my reasons for my conclusion on each of your requests. Some, I am able to grant. Others, I cannot fully satisfy at this time for the reasons outlined below. In the latter cases, I am, wherever possible, providing you with summary information which I hope will prove helpful.

1. When I talked to you earlier about the FBI Manual of Instructions, I did not realize that the Manual is actually a four-volume document containing detailed explanations of investigative techniques employed by the FBI in investigating criminal offenses and apprehending the offenders. For example, the Manual discusses the procedures followed by the FBI in kidnaping cases to insure the safety of the victim. It provides instructions with respect to handling aircraft hijackings. It also explains in detail the methods employed by burglars to open safes and instructs FBI agents in the control and protection of informants. A prospective criminal would be greatly assisted by knowing how the FBI attempts to solve a crime and what techniques and sources of information it relies upon. The public disclosure of this information would seriously prejudice law enforcement.

On the other hand, I recognize that the practices of the FBI should be subject to appropriate forms of Congressional review. To that end, I have concluded that appropriate arrangements should be worked out to make the Manual available on a confidential basis to the FBI oversight committee(s) that I expect the Congress to establish in the near future.

2. The entire Kent State investigation is again under review to reconsider the question of convening a federal grand jury. For this reason, the FBI reports must be considered as belonging to an active investigative file. Under the circumstances I am compelled to adhere to the policy confirmed by the Opinion of Attorney General Jackson of April 30, 1941, 40 Op. A.G. 45, 46, issued with the approval and at the direction of the President, which states that the investigative reports of the Federal Bureau of Investigation are of a confidential nature and that "congressional or public access to them would not be in the public interest."

I am, however, forwarding you a summary of the investigative reports on the Kent State killings prepared by the Civil Rights Division. This summary was used by the Division in its review of the case and was forwarded to the local prosecutor for his use in conducting the state grand jury investigation of the incident.

I will be glad to discuss Kent State further when the current review has been completed. In the meantime, I hope the enclosed summary is helpful to you.

3. During the hearings on the nomination of Richard Kleindienst to be Attorney General, you and other members of the Senate Judiciary Committee requested access to the following material: (i) interagency task force reports on antitrust policy; (ii) documents related to the ITT antitrust settlement; and (iii) reports relating to determinations of wrongdoing on the part of a United States Attorney. At that time, Mr. L. Patrick Gray III, then Assistant Attorney General, stated the Department's reasons for not disclosing these documents in a letter to Senator Eastland, Chairman, Committee on the Judiciary. Reprinted in Hearings on the Nomination of Richard G. Kleindienst to be Attorney General Before the Senate Committee on the Judiciary, 92d Cong., 2d Sess., pt. 3 at 1259, 1264 (1972). I have determined that certain of these documents can now be disclosed, while others should not be.

(i) On the basis of further checking with the other agencies concerned with these matters, and the diminished need for full confidentiality, I am now furnishing to you a copy of the Report of the Antitrust Subcommittee to the Cabinet Committee on Economic Policy. I am also furnishing the task force report on antitrust policy in accordance with your request.

(ii) The documents related to the ITT antitrust settlement that you request are confidential summaries of pretrial communications between officials of the Department and of representatives of ITT, investigative reports and intradepartmental communications. The disclosure of this information could severely impair the Department's ability to discharge its responsibilities effectively. Much of the information obtained by the Department in an antitrust case is given in confidence and to disclose it would breach that confidence. A breach

of confidence in this instance could well jeopardize our relations with opposing counsel in future negotiations. It could also prejudice the ability of the Antitrust Division to investigate and litigate antitrust cases because it would disclose investigative and negotiating techniques.

Furthermore, disclosure of this information could impair the decision-making process within this Department by severely inhibiting the exchange of ideas and recommendations necessary to effectively enforce the laws. Operating personnel must feel free to give their superiors candid assessments and absolutely impartial and disinterested advice. As President Kennedy said in letters dated February 8 and 9, 1962, directing the Secretaries of Defense and State not to disclose the name of the individual who had reviewed any particular speech:

"It would not be possible for you to maintain an orderly Department and receive the candid advice and loyal respect of your subordinates if they, instead of you and your senior associates, are to be individually answerable to the Congress, as well as to you, for their internal acts and advice." Reprinted in *Military Cold War Education and Speech Review Politics*, Hearing before the Special Preparedness Subcommittee of the Committee on Armed Services, United States Senate, 87th Cong., 2d Sess., pp. 508, 725.

It is my view that disclosure of these intradepartmental memoranda and other such documents would be contrary to the public interest because it would impair the effective discharge of the responsibilities of this Department. On these matters I hope, to use the words in your letter, that we may "avoid raising this issue to the level of a separation-of-power dispute."

(iii) The reports relating to determinations of wrongdoing on the part of a United States Attorney were withheld because they contain raw investigative data compiled to determine whether the individual was guilty of any improper conduct. These reports include suspicions and allegations about several individuals. Some of these allegations did not merit serious consideration. Others were never proved. These reports also include information submitted to the Department in confidence. The disclosure of this information would breach the Department's promise of confidentiality and could cause gross injustice to innocent individuals.

I am, however, furnishing to you summaries of these investigative reports. The summaries contain all of the relevant information about this investigation except for those matters that would violate confidence or constitute an unwarranted, and perhaps illegal, invasion of the privacy of individuals.

4. You have also requested the documents relating to the settlement of the ITT antitrust litigation in 1971 that the Securities and Exchange Commission forwarded to this Department for investigation of possible criminal obstruction of justice. Responsibility for conduct of this investigation has been assumed by Mr. Archibald Cox, the Special Prosecutor and Director of the Office of Watergate Special Prosecution Force. The charter establishing the duties and responsibilities of the Special Prosecutor provides that he "shall have full authority" in "dealing with and appearing before Congressional committees having jurisdiction over any aspect of [the investigation and possible prosecution of offenses conducted by him] and determining what documents, information, and assistance shall be provided to such committees." Accordingly, I am referring your request to Mr. Cox.

With kindest regards,  
Sincerely,

ELLIOT L. RICHARDSON,  
Attorney General.

cc: Mr. Archibald Cox

Senator KENNEDY. We welcome you here, Mr. Attorney General.

As I indicated at the outset this is a joint committee hearing. We have a full meeting of the Judiciary Committee at half past 10. Senator Muskie will chair the hearing at that time, so we will try and move ahead.

I have a number of questions on the matters on which I know you are going to speak this morning, so let us begin.

We want to welcome you here before the committees.

**STATEMENT OF ELLIOT L. RICHARDSON, ATTORNEY GENERAL,  
ACCOMPANIED BY: ROBERT G. DIXON, JR., ASSISTANT ATTORNEY  
GENERAL, OFFICE OF LEGAL COUNSEL; AND MARY C. LAWTON,  
DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL  
COUNSEL.**

Mr. RICHARDSON. Thank you very much, Mr. Chairman. Let me first identify for the record the two colleagues who accompany me here today. On my right is the Assistant Attorney General in charge of the Office of Legal Counsel, Mr. Robert G. Dixon and on my left his Deputy, Miss Mary C. Lawton.

I would, I think, Mr. Chairman, like to read the full statement because although it is fairly long it nevertheless represents a considerable effort to reduce to as succinct a form as possible my approach to a number of interrelated questions.

I am pleased to have the opportunity to appear before these subcommittees today to discuss with you an area of the law that bears directly on the vitality of our democratic system.

Freedom of information is basic to the democratic process. It must remain viable if a government of the people is to exist in practice as well as description.

Let me stress at the outset my commitment to the goal of implementing the public's "right to know" to the greatest extent consistent with good government.

The term "government secrecy"—the title of these hearings has a kind of foreboding resonance. Nothing would be so alien to our form of government as pervasive secrecy, for people cannot govern themselves if they cannot know the actions of their government.

Yet it is elementary that the welfare of the Nation and that of its citizens may require that some information be kept in confidence.

For example, there is some information and material within the Federal Government which must be given only very limited dissemination because it relates directly to the maintenance of our national defense and the successful conduct of our foreign relations.

The vital right of privacy requires that personal information accumulated in the extensive repositories of the Federal Government under income tax reporting laws, census reporting laws, government investigations, and other activities be protected from disclosure.

Similarly, a citizen must be able in confidence to complain to his government and provide information about matters that concern him. Confidential treatment must also be afforded to the decision-making process so that officials can give full, frank and disinterested advice to their superiors on policy matters without the fear that they will be exposed to public criticism.

Furthermore, officials within the government cannot operate effectively if the internal instructions that guide them in dealing with official business and arriving at decisions are public knowledge or if the investigative files they compile are disclosed.

The objective, of course, is not to keep secret the final decisions or supporting rationale—the ultimate resolution should be subject to final public debate.



Instead, the aim is to maintain the confidentiality of the process that leads to sound resolutions where the process cannot otherwise operate.

The tension between these exigent interests that I have just outlined and the vital interest in a fully informed citizenry in our democratic society is unavoidable.

Secrecy is thus a paradox. It is a threat as well as a necessary incident to democratic government. As the parent committee of one of the subcommittees holding these hearings today said in reporting on the bill that culminated in the Freedom of Information Act, it is not "an easy task to balance the opposing interests, but it is not an impossible one either . . . . Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure."

In this continuing endeavor, I have been asked to discuss three major areas that bear directly on freedom of information: (1), the Freedom of Information Act which governs the disclosure of information to the public and its proposed amendment, S. 1142, introduced by Senator Muskie; (2), the need to withhold certain information from the congressional testimony process, or on occasion from Congress, the furnishing of which would be contrary to the public interest—referred to as executive privilege; (3), the classification system designed to protect information essential to our national security, S. 1520, introduced by Senator Roth and the concepts underlying those provisions in the proposed Federal criminal code, S. 1400, that provide a basis for the prosecution of those who wrongfully disclose national security information.

The Freedom of Information Act, enacted in 1966, imposed on the executive branch an affirmative obligation to provide access to official information that previously was long shielded from public view.

Because the act radically departed from a predecessor statute that was considered more as a withholding statute than a disclosure statute, it required a major overhaul of both administrative practices and procedures.

It has been the experience of the Department of Justice, developed from our vantage point in advising other agencies on the legal requirements of the act, that the overhaul has not been complete.

As we see it, the problem in affording the public more access to official information is not statutory but administrative.

Although the language of the act is not altogether clear, we do not believe that this constitutes a major obstacle because the courts have resolved almost all legal doubts in favor of disclosure.

The real need is not in our view to revise the act extensively but to improve compliance.

Less than ideal compliance within agencies has various causes. In part, it may be due to the viewpoint of those who administer the act.

Most employees, whether employed in the public or private sector, tend to identify with their assignments, their office and their files. Under these circumstances, some doubts about granting access to agency files may be resolved against disclosure, especially in view of the natural fear of creating a bad precedent.

Additional problems arise because the administration of the act, which can sometimes be very complex and time consuming, requires the commitment of resources that are assigned to other statutory responsibilities of the agency.

Implementation of the act which is superimposed on the regular work of the agency can be an onerous responsibility. For example, within our own Department, the Immigration and Naturalization Service handles each month approximately 7,500 formal requests for information in addition to meeting its other statutorily imposed objectives.

Our very rough estimate of the total volume of Freedom of Information Act requests per year at the current rate for the Government as a whole is approximately half a million, of which some 100,000 are received by the Department of Justice.

The most immediate way to ensure greater compliance is to provide assistance and training for agencies and their staffs.

Mindful of the admonition that the well-intended provisions of the act can for the most part turn out to be hollow exhortations without an effective administrative system, we at the Department of Justice are considering several new means to upgrade the act's administration.

These include conducting seminars, publishing freedom of information newsletters or manuals, and perhaps other steps.

Furthermore, there are some steps that the Justice Department can take immediately to encourage better administration of the act, and I am today directing that four such steps be taken now.

First, we will request the Civil Service Commission to include freedom of information material in its executive training and legal training programs and to assist us in arranging for inclusion of similar material in other programs for training government personnel.

Second, we will conduct an interagency symposium on the Freedom of Information Act before the end of this year, to emphasize the need for improved administration and to provide the wider sharing of problems and ideas. This symposium will involve two-way communications as well as direct presentations, and we plan to invite the participation of congressional and private speakers.

Third, we will promptly institute discussions with the Administrative Conference of the United States, the Civil Service Commission, the Office of Management and Budget, and perhaps other agencies, seeking their assistance in launching a comprehensive study of how the executive branch can better organize itself to administer the act, both within and among the agencies.

Senator KENNEDY. Mr. Attorney General, could we recess for about a minute, I will be right back.

[Recess.]

Senator KENNEDY. You may proceed, thank you.

Mr. RICHARDSON. Thank you, Mr. Chairman.

This study will cover staffing, budgeting, training, and meeting the need for research in the application of the act to major areas like Government procurement, regulatory programs, law enforcement, and computerized records.

It will cover the extent to which desirable improvements should be effected by legislation, executive order, or departmental orders

It will take account of inputs from outside the executive branch, and it is designed to point the way to sound and relatively permanent improvements, including greater speed of processing, greater uniformity, and greater disclosure.

Our objective will be to have this study launched within 90 days and completed within 1 year, with reports to be furnished to Congress.

Fourth, I will immediately remind all Federal agencies of this Department's standing request that they consult our Freedom of Information Committee before issuing final denials of requests under the act.

In this connection I will order our litigating divisions not to defend freedom of information law suits against the agencies unless the committee has been consulted. And I will instruct the committee to make every possible effort to advance the objective of the fullest responsible disclosure.

No law is wholly self-explanatory or self-executing. Its success depends heavily on the judgment and attitude of those officials who administer the act and on the available resources that can be devoted to its execution.

The most careful and continuous vigilance must be maintained to assure that no more information is withheld than is absolutely necessary. As these hearings demonstrate, both the executive and legislative branches have indispensable roles to play in maintaining that vigilance.

I shall now discuss S. 1142 introduced by Senator Muskie which would amend the Freedom of Information Act. Because the Department of Justice will submit the usual detailed report on this bill in the near future, my present brief examination will be confined to some of the major provisions of S. 1142.

#### PROCEDURAL CHANGES

Two proposed amendments to the procedural provisions of the Freedom of Information Act cause us a great deal of concern. Several agencies, knowing that we would testify on S. 1142, asked us to reflect their vigorous objections to section 1(c) of the bill which would amend the act by imposing time limits of ten working days for an agency to determine whether to comply with any request and 20 working days to decide an appeal from any denial.

We sympathize with the contemplated purpose of imposing these deadlines—namely, expediting responses to requests for information.

This amendment, however, is far too rigid in application. Often files cannot be obtained within 10 days either because the filing systems are impervious to the description of the information requested or because the files are located in centers distantly located from the office receiving the request.

Occasionally, it is necessary for an agency to consult other agencies, organizations, even foreign governments in order to determine the propriety of releasing or withholding information.

Because such an amendment would encourage, indeed compel, hasty denials in acting on some complex or unique requests, it



would, we believe be counterproductive to the ultimate purpose of maximizing disclosure.

No agency should be required to adhere to a rigid 10- or 20-day limit at the cost of denying requests, in a spirit of caution, that might with more study and time be granted in whole or in part.

To avoid these problems yet provide for expeditious treatment of information requests, we suggest that our revised departmental regulations, which follow the recommendations of the Administrative Conference, be used as a working model.

Our regulations provide for 10- and 20-day deadlines but permit extensions of time under certain limited circumstances. I say that our regulations should serve only as a working model because after 3 months of experience we have found that we were overeager and undersophisticated and accordingly we expect to make some adjustments in our deadline provisions.

We believe that any amendment to the Freedom of Information Act, in addition to embodying the six reasons justifying extensions developed by the Administrative Conference, should also recognize the imperatives of processing large numbers of requests—a problem with which some agencies such as the Immigration and Naturalization Service, referred to above, are confronted.

Perhaps it would also be wise for each agency to maintain a public record of the number of requests it receives and the time within which it responds in order to permit the necessary vigilance I spoke of earlier.

The second procedural aspect of S. 1142 I shall discuss is subsection 1(d). Paragraph 1 of this subsection would impose upon the courts the requirement to engage in in camera inspections in every case. In *Environmental Protection Agency v. Mink*, 93 Sup. Ct. 827, decided this term, the Supreme Court construed the act as vesting in the courts, in cases other than those in which documents are classified, the discretion to determine whether an in camera inspection is necessary to the resolution of the case. We oppose any legislative attempt to overrule the Supreme Court's decision in *Mink* for two basic reasons.

First, to require in camera inspections of documents in every case is to underestimate the efficacy of oral testimony and sworn affidavits. As the Supreme Court said in *Mink*, "an agency should be given the opportunity, by means of detailed affidavits or oral testimony, to establish to the satisfaction of the district court(s) that he documents fall." The burden of proof is on the agency resisting disclosure. Only if the agency "fails to meet its burden without in camera inspection, the district court \* \* \* order such inspection. \* \* \* In short," said the Court, "in camera inspection of all documents is not a necessary or inevitable tool in every case." 93 Sup. Ct. at 839.

Second, an automatic in camera inspection provision will impose an unnecessary burden on the courts. Such inspections consume a great amount of a judge's time, particularly where the request is for a large number of documents. As the Supreme Court indicated in the above-quoted passages, it may not be necessary or appropriate to examine the documents because the "surrounding circumstances" may demonstrate that the exemption is clearly applicable. We be-

lieve that the question whether a particular case is appropriate for an in camera inspection where one or more of exemptions 2 through 9 are claimed should be left to the considered judgment of the court.

Paragraph 2 of subsection 1(d), which is a more specific application of the paragraph just discussed, would direct the courts to decide whether disclosure would be harmful to the national defense or foreign relations—good morning, Senator Muskie.

Senator MUSKIE. Good morning.

Mr. RICHARDSON. I was just in the process of discussing your bill, S. 1142 and I am now on page 12 of my prepared statement.

Paragraph 2 of subsection 1(d), which is a more specific application of the paragraph just discussed, would direct the courts to decide whether disclosure would be harmful to the national defense or foreign relations if the records were withheld under the first exemption of the act. In *Mink*, the Supreme Court found that judicial review did not extend to "Executive security classifications \* \* \* at the insistence of anyone who might seek to question them." 93 Sup. Ct. at 833.

We oppose this attempt to overrule legislatively the *Mink* decision simply because the courts, as they themselves have recognized, are not equipped to subject to judicial scrutiny Executive determinations that certain documents if disclosed would injure our foreign relations or national defense.

As the court of appeals said in *Epstein v. Resor*, 421 F.2d 930 (9th Cir. 1970) *Cert. denied*, 398 U.S. 965 (1970), "the question of what is desirable in the interest of national defense and foreign policy is not the sort of question that courts are designed to deal with."

In *C. & S. Air Lines versus Waterman Corp.*, 333 U.S. 103 (1948), the Supreme Court was more explicit:

[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the Government, executive and legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil.

They are decisions of a kind for which the judiciary has neither aptitude, facilities, nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Senator KENNEDY. Mr. Attorney General, just before moving into that area—you requested an opportunity to go through the statement and perhaps we can have the opportunity to question you a bit on the sections as you move through.

Do you remember what the law was before the Freedom of Information Act was passed, relating to the ability of the courts to examine materials in camera?

As I understand at that time they had complete flexibility to do so, did they not?

Mr. RICHARDSON. The courts had the complete flexibility to examine.

Senator KENNEDY. Material in camera prior to the Freedom of Information Act. It has only been with the Freedom of Information Act and the interpretation of it in the *Mink* case that we have had the kind of restrictions that we find ourselves addressing.

Mr. RICHARDSON. I do not think that proposition is clear with respect to national security issues. There is the *Scarbeck* case, for example, that indicates that there is the kind of restriction on judicial power that is touched on here in the *Waterman* case.

The problem really is one of the appropriateness of seeking to submit an issue of whether or not documents should be disclosed to a court.

There may of course be situations in which the court has the opportunity in camera to examine classified information where it is material to the issue in litigation and there have been cases, for example, of criminal prosecution where the government has been put to a choice between going forward with the prosecution or disclosing classified information. And in those cases there may be and has been in camera examination, but the very issue involved here is whether under the Freedom of Information Act, the court should pass on the appropriateness of the classification of the information in the first instance.

Senator KENNEDY. Now, let's take the different situations of the courts, first, being required to examine it, and second, being given the opportunity for discretion as to whether they would or would not examine it.

As I understand, prior to the Freedom of Information Act the courts had the discretion with which to examine even classified materials, and it was left up to the courts whether they would or would not.

Would your objections raised with regard to requiring the courts to examine information in camera be the same if instead of a requirement, we left it to the discretion of the courts?

Mr. RICHARDSON. Well, Senator Kennedy, the point I think is that there needs to be a distinction made between the right of the court to examine information in camera be the same if instead of a requirement, we left it to the discretion of the courts?

My understanding is that before the Freedom of Information Act the only basis on which the issues would have arisen in court would have been in the context of litigation.

The second problem, and the one that my testimony deals with is the question of whether the propriety of the classification of information and therefore the application of the exemption to classified information is appropriately an issue that a court can determine.

And the argument here is that the court really isn't well equipped to determine whether or not the information should have been classified in the first place. It is a different question whether or not in litigation the court should be allowed in camera to see classified information.

Senator KENNEDY. Well, as I understand, in the *Reynolds* case, often cited by the Department, the Supreme Court indicated that judicial control over the evidence in the case cannot be abdicated to the caprice of executive offices.

We have seen, particularly in recent times, where the problem has been the over-classification of materials by executive branches, and I suppose that one of the questions to be raised is shouldn't at least the courts have some opportunity or some discretion to be able to ex-



amine that material in camera in order to reach an informed judgment?

I would expect this would provide the best protection for the Executive, insuring that adequate classification procedures are being followed, and also for the public's right to know.

Mr. RICHARDSON. Well, again, Senator Kennedy, the distinction is between the power of the court to determine whether evidence is material and if not what should then follow and to determine the propriety of classification. It doesn't follow that the court has independent authority to determine whether or not the information was properly classified in the first place.

The point that I was dealing with here is expressed at the bottom of page 12 because what subsection 1(d) would do is to direct the courts to decide whether disclosure would be harmful to the national defense or foreign relations if the records were withheld. That is a different question to submit to a court than the question of how to deal with classified information that is pertinent to a case before it, subsection 1(d) in effect would give the court an independent power to review the validity of classification.

Now, I agree with you that there is a problem with respect to overclassification and I think it does need to be addressed. It is touched on later in my testimony in the context of how to deal with unauthorized disclosure of classified information.

But, in any event, it seems to me that however you deal with it to say that a court, to argue at least, that a court is not well equipped to pass on the validity of the degree of classification attached to information in the first instance by the executive branch is not to say that a court should be unable in camera to determine materiality of classified information. I hope I have made that clear.

Should I proceed then?

Senator KENNEDY. Senator Muskie?

Senator MUSKIE. Whatever the words, isn't the effect the same to impose on the court—on a given court the authority to review the justification of the original classification?

Mr. RICHARDSON. No; I don't think it is, Senator Muskie. Suppose, for example, a defendant is being prosecuted for espionage and he is said to have given important defense information to the agent of a foreign government. It may be material to the question of whether or not he is guilty of the crime charged, what the defense information was. It may be alleged by defense counsel that the jury should not be allowed to find him guilty unless the government is prepared to produce in open court the information it says is related to national defense.

In that instance the judge should have the opportunity in camera to see what the defense information was in order to make up his own mind whether or not the government should be required to produce it in open court so the jury can have it.

Now, that is the kind of determination which the courts have judicially made in camera where national security information was involved.

What your bill would do is to say that any person who seeks disclosure of information that has been classified top secret let us

say, may, if he is refused that information by a Government agency, go to court and get the court to compel the disclosure.

Now, whether the court would compel the disclosure, it is recognized by your bill, would turn in the first instance on whether or not the court believed that the classification was proper. And I am simply saying in quoting *Waterman*, that the courts have not heretofore felt that they were properly equipped to make that determination.

It is an inherently different kind of determination than whether or not the jury should get it. In the first case that I gave you the Government has sometimes, in effect, accepted a motion to dismiss rather than produce the information.

In any event whether or not it should go to the jury is currently a judicial determination: no one contests that.

Senator MUSKIE. There is a further line of questioning that has to do with the imposition of whether or not criminal penalties should be imposed for the unauthorized disclosure of improperly classified information.

I think I will withhold that line of questioning until we get to that.

Mr. RICHARDSON. Yes, and part 4 of my testimony deals with that issue.

Senator MUSKIE. Well, why don't you proceed then?

#### EXEMPTIONS

Mr. RICHARDSON. All right, thank you.

I turn now to the several proposed amendments in section 2 of S. 1142, which would revise exemptions two, four, six and seven of the act.

One, section 2(a) would amend the second exemption by restricting it solely to internal personnel practices, thereby excluding from its scope of protection operating rules, guidelines and manuals of procedure for Government employees.

We believe it is vital that this exemption encompass certain internal operating instructions, the disclosure of which would unduly impede the operations of an agency.

An agency cannot negotiate contracts effectively if its instructions to its negotiators are not kept confidential. Nor can an agency effectively investigate the degree of compliance with regulatory requirements if its operating procedures or its standards for determining when to conduct unannounced inspections are publicized.

Within our own Department, the FBI's procedures for protecting the lives of kidnap victims or for dealing with aircraft hijackers must remain secret.

Although we believe that exemption two, as now written, should be interpreted to protect such operating rules, an amendment of exemption two that clearly provides for such protection is desirable.

Senator KENNEDY. Mr. Attorney General, just on this area, in the course of our freedom of information hearings the spokesmen for different agencies have taken a similar position that they are reluctant to see investigative procedures generally revealed to the public. And I think you reiterated here a similar viewpoint—that an agency

cannot negotiate contracts effectively if its instructions to its negotiators are not kept confidential. Nor can an agency effectively investigate the degree of compliance with regulatory requirements if its operating procedures or its standards for determining when to conduct unannounced inspections or audits are publicized.

But as I see it is that we have employees in these various departments and administrative agencies—in the Justice Department Antitrust Division, in the Federal Trade Commission or the Federal Power Commission—who are intimately aware of the investigative procedures followed by these various agencies. And then they leave those agencies and they go right into private life and in many instances work with the industries that are being regulated, work for the companies that are being investigated.

These men are very much aware of the procedures being followed by the Antitrust Division, the Power Commission, the Trade Commission, and so they are able to take advantage of that expertise and knowledge while the public is virtually left in the dark on the procedures being followed, as is the smaller company that cannot afford to hire those who had worked for the Government in a highly responsible position.

So, the smaller businesses, the ones that are entering the field from a competitive point of view, or the public in general, are denied that kind of information.

Now, what is the justification for that?

Mr. RICHARDSON. Of course any practice may be adapted to account for the gradual extension of knowledge of its existence just as, in effect, people may change the locks on their doors if they lose the key.

And what we are dealing with here really is an ongoing process. Taking the case of contract negotiations for example, it is quite clear, I think that the specific instructions to negotiators in a given contract situation ought to be confidential.

In the case of unannounced inspections, for example, this is a kind of pattern that is relatively easy to vary if word seems to have gotten out as to the way it has been done in the past because of the transfers of employees and so on. But the fact that people do leave Government taking knowledge with them doesn't seem to me, in itself, a sufficient basis for saying therefore the Government should give up the attempt to maintain any confidentiality in areas where disclosure could significantly impair the effectiveness of its procedures.

The real question is would it impair it.

Senator KENNEDY. I don't know what areas would be so sensitive that it would not be in the public interest to reveal the contracting procedures or investigating procedures. These are all procedures that when individuals leave the Government they are taking with them.

I think we have seen these high Government officials in Democratic as well as Republican administrations, going to these major companies and they are bringing a great deal of that kind of information with them. And the public generally isn't aware of the kinds of procedures which these officials knew.

Your response is, well, maybe they will change those investigative



procedures. Well, why wouldn't it be in the public interest simply to reveal from the start, procedures followed in negotiating and investigating.

If we permit these kinds of procedures to be opened up to public view, the public might gain a great deal more confidence in the institutions of Government.

Mr. RICHARDSON. I certainly support the idea that vigorous onsite investigations and hard driving negotiations that are taking place should be known as a fact, but I think perhaps the more pertinent general comment is that in my view, as I have earlier testified, the burden should always be on the government to justify nondisclosure.

We should be able to show as a matter of fact that the disclosure for example of the FBI procedures for protecting the lives of kidnap victims could do damage. And all we are saying here with respect to the need for amendment of the act is that we don't believe that it would be desirable to restrict section 2(a) solely to internal personnel practices thereby preventing us from seeking to convince a court that the disclosure of operating rules, guidelines, manuals and procedures would do damage if, in fact, the word is so far disseminated as to a given practice.

The Government in the first instance might not any longer seek to keep it confidential, or if it did it might not be as convincing as it should be.

In any event, as I say, all we are saying is, don't amend the act so as to prevent us in a given case from coming forward with evidence that would be convincing.

Senator KENNEDY. Haven't the NASA audit manuals, and the FDA inspection reports been made public?

Mr. RICHARDSON. I am not sure. I know that in HEW, for example, I tried to exert a continuous sort of pressure in the direction of greater disclosures and we did break established precedents in a number of areas, for example, with respect to disclosure of inspections of nursing homes.

And, we have given out a great deal more information with respect to Food and Drug Administration activities, and I think this is right.

All I am saying to you is that a general policy in favor of disclosure should not be so expressed as to deny an opportunity to sustain a burden of proof that in a given case disclosure would be counter-productive.

Senator KENNEDY. Has the disclosure in HEW been harmful to the department itself, has it worked to the harassment of the department?

Mr. RICHARDSON. No; I think not. I think we wouldn't have modified earlier policies if we had thought that significant damage would be done. And in general we felt that maximum disclosure is a better policy.

What we are dealing with here, though are the specific exemptions under the act. And the proposed amendment we are discussing now would in effect, undertake to prevent the government even from establishing the potential damage that could be done in a given instance.

Senator KENNEDY. Do you draw a distinction between what ought to be made available to the public and what ought to be made available to the Congress?

Mr. RICHARDSON. Yes; but I think in the latter case the problem simply would involve in a given instance the terms and conditions under which information was made available. The obvious example, of course, is classified information, and we do constantly make classified information available to the Congress under the understanding that it will be done in executive session, for example.

In the case of some highly sensitive matters, the information will be made available only to members of a committee. There are often arrangements worked out whereby the arrangements will be safeguarded by locking it in a committee safe and so on.

But in short, we recognize that the oversight responsibilities of the Congress entitle the Congress in many instances to information which should not however be publicly disclosed.

Senator KENNEDY. All right.

Mr. RICHARDSON. I proceed then to discussion of section 2(b) that would amend the fourth exemption. This exemption is designed to enable the government to maintain in confidence information submitted to it by persons, usually businessmen, who would not otherwise voluntarily furnish the information or customarily release it to the public.

Some courts have treated this exemption as exclusively for business information, and the proposed amendment would similarly limit the scope of protection of exemption 4 to include only commercial or financial information.

We suggest that there is an imbalance in an amendment that protects information submitted in confidence by businessmen but denies protection to confidential information furnished by other citizens.

This amendment would not permit an agency to withhold statements by witnesses to an industrial accident, an airplane crash or an explosion even if such statements could only be obtained upon a pledge of confidence.

Nor would it permit an agency to assure a scientist that the confidential data he submits on the environment, automobile safety, health or other matters would be withheld from any person who requested it.

Even information subject to a doctor-patient or lawyer-client privilege would no longer be protected unless "commercial or financial."

We conclude that whenever functions entrusted to government reasonably require information from sources which legitimately expect confidential treatment for such information, the government must be able to promise such treatment and thereafter honor its promise—a citizen must be able to confide in his government.

For these reasons, we endorse the amendment to the fourth exemption presented by the American Bar Association to the subcommittees during these hearings.

Three, section 2(c) would amend the sixth or privacy exemption by exempting medical, personnel, and other privacy-type "records," rather than exempting such type of "files." We believe that the

existing exemption should be interpreted as you propose in this amendment and that agencies should exercise due diligence in protecting information the disclosure of which would invade a person's privacy. Records which would otherwise be nonexempt should not be withheld merely because they are part of a personnel file. In sum, although we do not believe that an amendment is necessary, we support the purpose the amendment seeks to achieve.

Four, section 2(d) would amend in several respects the seventh exemption, which denies public access to "investigatory files compiled for law enforcement purposes."

The phrase "law enforcement purposes" would be changed to "any specific law enforcement purpose the disclosure of which is not in the public interest."

We are uncertain what change this amendment contemplates. We believe, though, that any amendment should make clear that law enforcement agencies are permitted to maintain in confidence investigatory techniques and information that may be employed in subsequent investigations.

Often information obtained in an investigation, particularly in fields such as organized crime and antitrust, can be used in other law enforcement investigations.

The information therefore must remain confidential in order to prevent a prospective defendant from knowing how much or how little information the agency has about him and, indeed, whether he is under investigation.

The proposed amendment should be made sufficiently clear to accommodate these vital interests in law enforcement.

Section 2(d) of the bill would also limit the coverage of the exemption by excluding: (1), scientific tests, (2) inspection reports relating to health, safety or environmental protection, and (3) any investigatory records which are also used as a basis for public policy statements or rulemaking.

These changes would seriously impair the law enforcement capability of many agencies.

The provision excluding scientific tests, reports or data from the protection of the exemption presents several problems.

First, it could jeopardize the right to an impartial trial by permitting any requestor to obtain and publish any incriminating scientific tests, such as ballistic reports, before the defendant is brought to trial.

Second, because the act does not permit an agency to determine whether a requestor has a rational basis for seeking information, any one could insist on obtaining autopsy reports or other medical reports on victims of crime, which reports may not be exempt under exemption six if the victim is dead.

Because this same information can be obtained in discovery proceedings, in which the need of the individual for the reports is a proper consideration, we do not believe an amendment is necessary.

The provision denying the protection of exemption seven to inspection records relating to health, safety or environmental protection would impede the efforts of agencies to take law enforcement action against offenders.



It would permit offenders to obtain these records and thereby discover all of the details that an agency intends to use against them in any law enforcement action, whether civil or criminal.

Finally, the provision excluding from the coverage of exemption seven records which serve as a basis for public statements or regulations not only would inhibit rulemaking in important regulatory areas but also would restrict the flow of information to the public by discouraging official discussion of public business.

For example, if a Justice Department spokesman announced that on the basis of an investigation by the FBI and the Criminal Division a grand jury would be convened to consider indictments, all of the investigatory reports apparently would no longer be protected by exemption seven.

The protection of this information cannot depend on the continued silence of officials in making public statements or issuing regulations.

If a fresh approach is needed, we suggest that a modified version of the ABA's proposed amendment should be considered along the following lines:

The provisions of this section shall not be applicable to matters that are. . . (7), investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency; *Provided*, That this exemption shall be invoked only while a law enforcement proceeding or investigation to which such files pertain is pending or contemplated, or to the extent that the production of such files would (A) interfere with law enforcement functions designed directly to protect individuals against violations of law, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) disclose the identity of an informant, (D) disclose investigatory techniques and procedures, (E) damage the reputation of innocent persons, or (F) jeopardize law enforcement personnel or their families or assignments.

Five, section 3 of the bill would require every agency to furnish any information or records to Congress upon written request. Because it bears directly on the authority of the President to withhold those documents the disclosure of which would be contrary to the public interest, I will defer discussion of this aspect of the bill until the section of my statement on Executive Privilege.

Six section 4 of S. 1142 would require each agency to make an annual report to Congress on its administration of the act.

Although we believe that no legislation is necessary to require the submission of these reports, we do not object to the general purpose of the amendment.

In fact, we respect this vigilance by Congress. In our detailed report to be submitted on this bill, we posit some suggestions to improve any such reporting system.

Senator KENNEDY. Mr. Attorney General, I am going to have to leave very shortly, and I have just a few other questions.

For the record, do you believe that the Freedom of Information Act applies to requests for information by Congress?

Mr. RICHARDSON. No, except as it has been construed, but it does not apply to requests by the Congress acting as the legislative branch of Government. We believe that it does apply to an individual Member of Congress of either house and I think that this has been the construction put on the act by the courts.

In other words if the request comes to the executive branch from a congressional committee, then the act would not apply. If it comes to the executive branch from an individual Member of the Congress it would.

#### WITHOLDING OF INFORMATION FROM CONGRESS BY REGULATORY AGENCY

Senator KENNEDY. Can the doctrine of executive privilege be invoked by the chairman of an independent regulatory agency, traditionally recognized as an arm of the Congress?

Mr. RICHARDSON. As I construe the concept, Senator Kennedy, only the President can invoke executive privilege, or at least only the President has the ultimate power to do so. He could, I suppose, establish some procedure for delegating that power and I believe that in the first part of the Eisenhower administration President Eisenhower did do that.

Under this administration it has been required that in any instance where a representative of the executive branch thought that the executive privilege might apply the matter had to be referred to the President through the Attorney General for an ultimate determination by the President.

In any event, I construe executive privilege as a doctrine applicable only to information denied to another branch of government at the behest of the President.

Most situations in which information is withheld are handled on the basis essentially of comity between the branches on the basis of a mutual understanding that there are valid practical considerations for withholding it.

Senator KENNEDY. Do you see any reason why a regulatory agency ought to be able to withhold information from the Congress?

Mr. RICHARDSON. I think the reasons are purely practical in the sense that the regulatory agency may be acting in a quasi-judicial capacity. The right, after all, as I pointed out in the opening pages of this discussion, to withhold information has not been asserted by the executive branch alone but also by the judicial and legislative branches.

Take for example a pending investigation by the Congress in which questions have been prepared for a prospective witness. Should I, for example, as Attorney General, have the right to demand these questions simply because I believe them to have been prepared?

I would suppose that a committee chairman acting on the basis of legislative privilege, could refuse them. I would expect similarly that the Supreme Court of the United States could, and would, and indeed should refuse to publish a draft opinion or to announce the vote in conference. In fact, there have been very few leaks in the entire history of the Supreme Court of the United States from the conference and if such leaks did occur, they could obviously in a given case radically affect the price of stock in a given company for instance.

And so what we are dealing with here essentially is situations in which there are relatively sensible understandable reasons for non-

disclosure and these reasons have basically been the footing on which matters of this kind have been resolved over the years as between Congress and the executive branch and both of these two branches in dealing with the courts.

Now, a regulatory agency may, when it is dealing, for example, in an antitrust matter, take the Federal Trade Commission under the Clayton Act dealing in very much the kind of situation that a court is dealing with in the Sherman Act case, refuse to disclose. Considerations affecting nondisclosure of deliberations of the Commission are essentially the same as for a court.

And I don't think, as I go on to say in this statement, that the business of government under our constitutional separation of powers can be reduced to mechanical rules. This, I think, is basically the reason why executive privilege has formally been invoked so seldom—in this administration to date three claims involving four matters; in the Johnson administration one claim involving two; the Kennedy administration one claim involving two; in the Eisenhower second term nine claims, although the Library of Congress, I believe, cites three others which did not involve formal claims.

That is not, of course, by any means the limit of the number of instances in which information has been withheld but ordinarily it is withheld on the basis that I would not characterize as involving the invocation of executive privilege but rather as I have tried to suggest on the basis of common sense understanding that there should be mutual restraints between the coordinate branches of government.

#### EXECUTIVE PRIVILEGE

Senator KENNEDY. Do you believe that the President ought to be able to exercise it on any occasion that he so desires?

Mr. RICHARDSON. I think that if the President of course were acting arbitrarily there might be a question of power, but in the end the determination must be his as a practical matter as between himself and the legislature just as I think this must be the legislature's ultimate determination in determining the scope of its own authority in dealing with the executive branch.

In both cases, in my view, the issue may be subject to judicial determination. Now, we don't know this for a certainty because no court has ever ruled on a claim of executive privilege as applied to a demand for information by the Congress.

And yet, it seems to me that if the courts of this country have, as they were held by Chief Justice Marshall and have ever since been recognized to have, the power to invalidate legislation or to set aside executive action as in the *United Mine Workers* case, for example, then they ought to have the power to adjudicate a claim of privilege as between the other two branches.

Senator KENNEDY. Is the question whether it is an arbitrary exercise of power going to be left up to the Executive, or is it going to be left up to the Congress, or to the courts?

Mr. RICHARDSON. If it were truly arbitrary, in other words, if it were an act that couldn't be—

Senator KENNEDY. What about an interpretation that anyone in



the executive branch is eligible for executive privilege at the whim of the President?

Mr. RICHARDSON. I am sorry.

Senator KENNEDY. We heard earlier before this committee from the Attorney General that the cloak of executive privilege could in effect be thrown over anyone who was working within the executive department, apparently at the whim of the President himself.

Mr. RICHARDSON. I don't read Attorney General Kleindienst's testimony that broadly; I think what he was saying—

Senator KENNEDY. Is your opinion the same as Attorney General Kleindienst as to the scope of the executive privilege?

Mr. RICHARDSON. I wouldn't express it in the same way because as I have tried to indicate, I think executive privilege applies only on the basis of an assertion by the President in a given case that information should be withheld.

I think that in the great bulk of all situations in which there is the nondisclosure or the withholding of information by an executive branch agency from the Congress that this is a result not involving executive privilege; it is a result involving essentially comity between the branches, each of which respects the fact that the other has a job to do. And I think that this is the basis on which most such matters are resolved.

Now, it follows in any event that if the President does assert the privilege it should only be in a situation that he considers to be of basic importance and it should not be therefore a matter of whim. And I would not visualize the executive privilege as attaching as a matter of whim to any old matter in which the Congress might express an interest. It has never happened that way and I don't believe it will or should.

Now, when I referred to arbitrary action on the part of the President himself I was simply acknowledging the possibility that no rational basis could be found for what he did. And in that event, of course, there would be no remedy presumably other than impeachment or possibly some extraordinary writ issued by a court.

The extraordinary writs, by definition historically I take it, are available to restrain or compel official action that is so far beyond the pale of rational support that some intervention should occur. In any event that has never happened and I hope it never does happen.

Senator KENNEDY. Mr. Attorney General, let me ask you, is it your opinion that the President could be called to appear before a congressional committee?

Mr. RICHARDSON. I have not reached any firm opinion on that point, Senator Kennedy. It is a difficult question, of course, because the President is the head of the executive branch and I think it is very doubtful that a congressional committee could compel his appearance if he determined for what he thought was valid reason that he ought not to appear. There are some indications going back to the *Aaron Burr* case that a court may have a power to subpoena a President but there are also indications that if the President didn't respond, the court would be powerless to act. The issue has never risen, or even, so far as I know, been the subject of judicial discussion.

With respect to congressional power of subpoena, we have again one of those situations in which one would hope that the rule of reason would prevail. And indeed, I think it is fair to say that at the point when the rule of reason breaks down in relations between the coordinate branches of our Government we have slipped over the edge of anarchy.

Senator KENNEDY. Would your answer be the same with regard to the grand jury as well?

Mr. RICHARDSON. Yes, essentially, although there is a little more of an indication that there may be powers on the judicial side, particularly where criminal investigations are concerned than is true with respect to the Executive-congressional relationship.

In any event, however, the law on the subject is so scanty that I don't believe any responsible lawyer could assert either side of this issue with great confidence.

Senator KENNEDY. The reason I asked the question is because the Justice Department had vigorously and successfully urged the position in the *Gravel* case that a member of the Senate should be called to appear before the grand jury. I was just wondering, if your reasons and justifications apply to one branch of Government, the executive, why they don't apply to the other branch the legislative, especially given the additional protection of the speech and debate clause which applies to Members of Congress?

Mr. RICHARDSON. I think it is a matter of degree, Senator Kennedy.

Senator KENNEDY. What is the degree: the Members of the Senate do and the executive doesn't?

Mr. RICHARDSON. I think it is simply a sense that there may be a distinction between bodies which in combination embrace 500-odd members and the uniqueness of the presidency. There is attached to the Presidency as an office a kind of historic aura of quite a special character.

In any event all I am really saying is that lacking any instance in which a court has been called upon to resolve this issue or any of the related issues you touched on, no lawyer can be confident of the answer.

After all, we are trained to look at statutes or language of constitutions, or at decided cases in arriving at opinions and in this instance none of those materials is available to us.

Senator KENNEDY. If you will excuse me, Mr. Attorney General, Senator Muskie is going to preside; I have an executive session of the Judiciary Committee this morning.

I want to thank you very much for your appearance. I would like to submit some other questions in writing to you if you would respond.

Mr. RICHARDSON. Thank you, Mr. Chairman.

As the foregoing discussion indicates, Congress has by statute recognized that there are certain types of information that should not be publicly disclosed.

The Freedom of Information Act reflects, in effect, legislative value judgements as to when the public interest—normally served by disclosure—is better served by nondisclosure. These are judgments which, in different contexts, have been recognized by all three branches of Government.

Congress has concluded on various occasions that certain documents in its possession should not be disclosed under certain circumstances because the long-term interests of representative Government are better served by nondisclosure.

For example, the House resolved that no documentary evidence in its control may be taken from it by judicial process without its consent. The Senate has taken a comparable position.

Similarly, the courts have concluded that it is not appropriate for them to be the ultimate arbiter of what information the other two branches should disclose or not disclose.

If a court could say to the Congress that it could use or could not use information in its possession, the independence of the Legislature would be destroyed and the constitutional separation of the powers of Government invaded. Nothing is better settled than that each of the three great departments of Government shall be independent and not subject to be controlled directly or indirectly by either of the others.—*Hearst v. Black* L 87 F.2d 68, 72 (D.C. App. 1936), See also, *United States v. Reynolds*, 345 U.S. 1, 8 (1953).

The executive branch, of course, also subscribes to the broadly recognized principle that the public interest is, at times, better served by nondisclosure. When all three branches agree with the required value judgment in a given set of circumstances, accommodation follows as a matter of comity. It is when there is disagreement that conflict arises—and has arisen since the days of Washington. In very rare instances the Executive, asserting a privilege grounded in the public interest, has decided to withhold information or to require safeguards on disclosure. In recent years the shorthand term “executive privilege” has come to identify this traditional area of separation of powers.

If I may, Messrs. Chairmen, I would like to probe beyond that term, which has become controversial and sometimes mischaracterized, to explore with you the basic value judgments that must be made—not only by the executive, but at times by all three branches of government.

We are agreed, I think, that our form of government pre-supposes openness and an informed citizenry. This is reflected by the first amendment. We also agreed, I hope, that there are, on occasion, circumstances which dictate that public exposure of certain data be at least deferred if not denied—not to deceive the public, but to better serve it. From my own experience in the State Department, I know that there are times when premature disclosure of delicate negotiations or the discussions and instructions preceding them cannot be spread upon a public record. I know, too, that Congress has recognized this. A time-honored formula for resolutions of inquiry to the Department of State has requested that information be furnished “if not incompatible with the public interest.” See Cannon, *Procedure in the House of Representatives*, H. Col. 610, 8th Cong., 2 sess., p. 219.

The Congress has staunchly defended the right of its members to secure the candid advice and assistance of legislative aides and has, I think, recognized that this necessary adjunct to the exercise of its constitutional responsibilities is equally necessary to the effective functioning of the other branches. The courts share this respect for the need of candid advice, *Soucie v. David*, 448 F. 2d 1067, 1080 (DC Cir. 1971) (Wilkey, J. concurring) as does the executive branch.



Another area in which the need to preserve secrecy is well understood, not only by all branches of the government, but by the public as well, is the security of military secrets. While "a slip of the lip may sink a ship" is almost a forgotten slogan, the concept behind it is still valid and accepted. See S. Rept. 1761, 86th Cong., 2d sess., p. 22.

Today, more than ever, the value of personal privacy is recognized and zealously guarded by the people of this country. Yet it is this area, perhaps above all others, that presents conflicts for the people and their government. The desire to know as much as possible coupled with the technology that makes accumulation of vast stores of knowledge possible also engenders problems. Historically, we have been confronted with the fair-trial, free-press problem, but television adds greater dimensions. We have always had the question of governmental disclosure of investigative reports without due process checks and balances. Present large scale dissemination capabilities exacerbate the problem by endangering both personal privacy and the confidentiality that may be necessary to effective law enforcement.

Given our form of government it is not surprising that although sharing basic values—the survival of our Nation, the keeping of commitments, the protection of the individual—we can nevertheless disagree as to how these values are best served. What is perhaps surprising is how few the real disputes have been among the three branches of government in applying these values to concrete situations. It is a tribute to the spirit of comity that throughout history there have been so few true "invocations of executive privilege."

The legislation before these subcommittees, section 3 of S. 1142, S. 1923 and S. Con. Res. 30, attempts in various ways to provide a permanent, and more or less rigid, accommodation of these varying value judgments. Aside from the constitutional issues, which have previously been discussed in testimony by the Department's witnesses, I think it most unwise to attempt to legislate rigid solutions for what must always remain flexible in nature.

Almost 200 years of history has demonstrated very few serious and insoluble conflicts between Congress and the Executive over the question of what information must be disclosed to Congress. On the contrary, our history shows consistent agreement on values, with only occasional conflicts on specifics, over a period of 184 years. Experience suggests that we have chosen comity as the wiser course. I would not turn away from that history; together we should build on it.

As a basic legal matter, attempts to define what congressional requests for information rise to the level of a constitutional confrontation are both difficult and hazardous. I urge the Congress not to force the issue. Our history tells us it is not necessary; surely, then, it is not desirable.

On a personal basis, I have a strong desire to reach accommodations and to be forthcoming in regard to public knowledge of the public business. I believe my record of public service demonstrates that I have translated that desire into practice. It is in that spirit that I have undertaken my new position.

## CLASSIFICATION SYSTEM

Finally, Mr. Chairman, I would like to discuss briefly the need for constraints on the dissemination of classified information.

As the Freedom of Information Act recognizes, there is genuine need to protect from being publicized information that bears directly on the effectiveness of our national security and the successful conduct of our foreign relations.

Even in times of peace, military secrecy is essential. The disclosure of contingency plans or weapons system capabilities could disturb the balance of power by helping other nations develop countermeasures to neutralize our defenses or eliminate our strategic advantages. The recent confidential discussions between Presidential Assistant Henry Kissinger and officials of the People's Republic of China illustrate the vital role that secrecy may also play in the conduct of foreign relations.

Our task, then, is to accommodate the interests of the government, in behalf of the public, in keeping some information secret with the general public's need to be informed. All democratic governments face this tension between the need for public accountability and the imperatives of national security.

## CRIMINAL OFFENSES

This tension is, of course, highlighted by the attempt to define criminal offenses involving the unlawful dissemination of such national security information. This is the focus of certain provisions of two bills, S. 1 and S. 1400, presently pending in the Senate. I have briefly examined the "national security" provisions of those bills, but I have not had opportunity to consider fully the substantive nature of the proposed legislation and its effect on current law.

I do wish, however, to make some general comments on the considerations relevant to any effort to define the circumstances under which the disclosure of legitimately secret government information should be a criminal offense.

Basically, I believe that a carefully designed system of criminal sanctions is appropriate where the information is genuinely and directly related to the maintenance of our national defense or to the successful conduct of foreign relations. Any such system must accommodate three general—and often conflicting—objectives.

The first objective, of course, is to deter and, where necessary, to punish unauthorized disclosure of highly sensitive information in those situations where the national security requires it. The most troublesome problems inherent in achieving this objective involve the drawing of distinctions between types of offenses and the gradations among the penalties appropriate to each.

The second objective of any system of criminal sanctions should be the elimination so far as possible of the risk that such sanctions will inhibit the proper role of a free press or free expression under our Constitution. The system should focus primarily on the disclosure of secret government information by persons who are authorized possessors of it and who breach the trust the public reposes in them.

Such persons are those upon whom the duty to protect the national interest is primarily imposed. A secondary and more limited function of the system, except where espionage is involved, should be to define those types of receipt and dissemination by persons not entrusted with the information which should appropriately be made subject to criminal sanctions.

A third objective should be to minimize the risk of unwarranted prosecutions for disclosing information that either should never have been classified in the first place or was no longer properly classified at the time of its disclosure. Apart from the exercise of sound prosecutorial discretion—which should, of course, always apply—one possible approach would be to permit the defendant in such a case to seek to show that the violation did not in fact harm a significant national interest. The difficulty, of course, with allowing this particular affirmative defense, is that it would enable the defendant to take advantage of post-disclosure developments, notwithstanding the fact that the considerations which led to the classification of the information disclosed were still, at the time of disclosure, valid and reasonable.

To obviate this objection, the defendant could alternatively be allowed to defend himself on the ground that the classification was improper *ab initio*, or at least as of the date of disclosure. This approach, while eliminating one difficulty, leaves open another serious question: How should the propriety of the classification be decided? To put the government to its proof in open court would in many if not most instances require making public circumstances justifying the classification whose publication might do more harm to the national interest than the disclosure for which the defendant was being prosecuted. One way to meet this difficulty is to establish a process by which the court would decide the issue *in camera*. This brings us back to our earlier colloquy. It has also been suggested that the decision be made by some specially constituted body.

Quite apart, however, from the question of adjudicative process, there is the question of whether the issue is appropriately subject to adjudication.

The Supreme Court in *C. & S. Air Lines v. Waterman Corp.*, as cited earlier in my testimony, stated:

[T]he very nature of executive decisions as to foreign policy is political, not judicial. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

This, in fact, is the concern which underlies the section of S. 1400 providing that "It is not a defense to a prosecution \* \* \* that the classified information was improperly classified at the time of its classification or at the time of the offense." [§ 124(d)]. To me there is considerable force to this concern. By this route, at any rate, I am led to want to explore further the possibility of assuring that administrative remedies are available to an individual who wishes to challenge the legitimacy of a classification. It may well be that preclusion of an affirmative defense is only justified when adequate procedures exist for appeal of classification. It seems important, moreover, that this chain of appeal extend beyond the agency where the



classification originates or where the party wishing to challenge it is employed.

#### CLASSIFICATION SYSTEM

Just such an administrative process is, as a matter of fact, now in operation, though it is of very recent origin. It provides for better intra-agency appeal and appeal beyond agency boundaries to the Interagency Classification Review Committee.

Recognizing that the classification system which first emerged in World War I and grew to maturity in World War II had a tendency to emphasize secrecy at the expense of the public's "right to know," the President, in order to offset this tendency, issued Executive Order No. 11652 on March 8 of last year. The purpose of this order is to foster the widest dissemination of information not required to be safeguarded in the interest of national defense and to prevent unauthorized disclosure of information properly withheld from the public domain.

There are a number of features in the Executive order specifically designed to check any tendency toward over-classification. I would like to note them briefly.

First, the order significantly reduces the number of agencies and officials which have authority to classify.

Second, the order establishes a "General Declassification Schedule" designed to declassify documents automatically, without review, in a relatively short period of time.

Third, the order provides that the originator of the classification must reexamine the propriety of the classification of the information he classified when requested by a holder of the classified information. A determination that the classification is appropriate can be appealed to a review committee which is established in each department to monitor the implementation of the order.

I might interject here, Mr. Chairman, a thought that ties back with what I said earlier about criminal penalties, that the review body might better be established outside the agency responsible for the classification.

Fourth, the Executive order also establishes procedures under which a private individual can request that certain document be declassified so that he may obtain access to them. Appropriate appellate procedures are provided to permit the requester to appeal any adverse determination.

Fifth, the order requires that classified material identify on its face the classifying officer, and provides that "repeated abuse of the classification process shall be grounds for an administrative reprimand."

Finally, an Interagency Classification Review Committee is established to consider not only requests for declassification originally denied on the departmental level. That would take care of the point I mentioned a moment ago—but also complaints from people within or without the Government with respect to the administration of the order.

In sum, the basic thrust of the Executive order is to require executive officials to classify less, to expedite declassification, and to pro-

vide better protection for that information which truly requires protection. I believe that this substantially revised system of classification will go a long way toward making more information available to the public more quickly.

In conjunction with this discussion of the classification system, I would also like to discuss S. 1520, which would establish a seven-member commission to study current laws and practices relating to the classification of documents and to recommend what, if any, modifications may be necessary. The commission would consist of two Senators, two Representatives, and three public members, at least one of whom must be a newsman.

We believe that the creation of such a commission would be premature. Executive Order No. 11652 was the culmination of a comprehensive review of classification policies and procedures by an interagency committee and has been in operation for only a little more than 1 year. I have already mentioned some of the progress being made toward tightening the classification process. The Interagency committee is continuing to press for further progress. Until Executive Order No. 11652 has been in operation for a longer period, it seems unlikely that an accurate evaluation of its effectiveness can be made.

Aside from the foregoing, I note another major flaw in S. 1520. While the bill would create a commission to study the effectiveness of and need for changes in the classification law and practices within the executive branch, it contains no provision for executive branch representation on the commission. Since the people who regularly deal with the classification of documents and with declassification procedures have had valuable practical experience in the problem involved, it seems important that any group studying the subject should take advantage of that experience.

In conclusion, Messrs. Chairmen, we deal here today with a field of law in which the interests are of the highest rank and necessity. It is indeed an unfortunate paradox that such vital interests as personal privacy and national defense sometimes conflict with the equally vital interest of the public in being informed as to the workings of the Government.

I hope these hearings will lead both the executive and legislative branches to a workable formula that strikes the proper balance.

Senator MUSKIE [presiding]. Thank you, Mr. Attorney General.

Just as a preface to the questions I have about espionage and official secrecy and classification of information as problems we face in drafting new statutes, I want to note the one concern that has affected Congress in all of its previous attempts to grapple with this area. That concern is the conflict you also note in your statement between the first amendment guarantees of free speech and free press and the need for a certain secrecy for vital information intimately linked to successful defense and foreign policy.

There has been an evolution of thinking on this subject ever since 1917. In 1917 the Congress rejected a number of President Wilson's Espionage Act proposals because it saw them as a prelude to official censorship. It even threw out language which would have authorized a system of information classification which we now accept.

In 1950 in passing the McCarran Internal Security Act the Senate reinserted a provision that had been briefly deleted to say, and I quote "Nothing in this act shall be construed to authorize, require or establish, military or civilian censorship or in any way to limit or infringe upon the freedom of the press or on speech."

Quite frankly, I hope that Congress would again reject any laws so sweeping in their effect as to endanger the role of the press inspiring and conducting public debate on the Nation's business.

Democracy takes certain risks, one of the crucial ones that almost defines democracy is the risk that free speech would hinder official conduct. We accept that risk, or have.

And while I am hopeful that Congress will not tolerate language as broad and as potentially dangerous as that proposed in this session to criminalize unauthorized disclosures of all sorts of Government information, I am anxious that we try to reconcile the secrecy-publicity conflict with a good and clear law.

Your instinct seems to be against any attempt to recodify or to codify rules more clearly defining the relationship against the President and the Congress. In this my instinct is the other way, I think we should try to develop a clear law, that might be helpful in avoiding and resolving conflicts.

It seems to me the recodification of the criminal statutes offers us an opportunity and a challenge to clarify congressional intent in an area where previous efforts have only clouded the issue. I think we can welcome that opportunity to write a sound statute but we may have to begin by erasing from our minds all the efforts that have gone before and going back to the unchangeable constitutional principles that make our system unique.

So, starting from your statement that you have only a brief acquaintance with the actual provisions of S. 1 and S. 1400, and from my feeling that any discussion of the status of present law would only lead us into unnecessary confusion, let me see if we can agree on some of the standards that a good law should embody.

So, rather than get into the word by word analysis of S. 1400 and other legislation, that would be the thrust of my question. It seems to me that if we can clarify the values and the standards and the objectives upon which we might be able to agree that it should be reasonably simple—or maybe that is the wrong word—reasonably easier at least to find the language in statute law which would reflect those values.

I would like, before I get to the questions dealing with espionage and disclosure of classified information, to return to the subject that Senator Kennedy opened up on the question of executive privilege. And I do this not to provoke disagreement between us here but really to clarify my understanding of what you believe to be the nature, the scope and the limitations of executive privilege.

#### EXECUTIVE PRIVILEGE

Now, Senator Ervin has said many times in the course of these hearings that he regarded executive privilege as rooted in the wisdom of permitting a President to conduct confidential discussions



with trusted advisers free of any threat that those discussions might be disclosed.

Now that, in the context of all the discussions that we have heard here in this committee, and even of your discussion, was a pretty limited view of executive privilege. I take it that you would not consider it to be limited in that fashion?

Mr. RICHARDSON. My only guide to the answer to that question, Mr. Chairman, is first that of what seems to me to be common sense understanding of relationships between the branches; and second the historic precedents established by the situations in which the Presidents have in the past invoked the privilege.

These are not restricted to confidential discussions with trusted advisers, they include matters of national security, they include matters of foreign relations, as well as law enforcement and investigatory files within areas specifically entrusted to the executive branch.

I don't know of any real guide to the scope of the privilege other than these precedents. Let me just comment on one point you made earlier with respect to the need for clarity.

I agree that it is important to be clear in the drafting of a criminal code which imposes penal sanctions for its violations. I think the considerations, however, with respect to the Congress and the President in the scope of the executive privilege are quite different.

In other words, I don't think anybody should be sent to jail under a statute so vague that he can't tell in advance what is the general area of the actions prohibited.

Conversely, however, I don't think it serves any very useful purpose to try to spell out in detail what are the specific limitations of executive privilege.

I think on the whole, given the relatively small number of situations in which it has been invoked, that the development of mutual understanding between the executive and the legislative branches has worked pretty well.

Senator MUSKIE. Let me say that the instances of formal invocation of privilege I don't think are very sufficient measures of the impact of the President's claim to it. It seems to me that there has developed over the years an increasing tendency on the part of executive branch personnel to withhold information, sometimes under the explicit assertion that executive privilege would apply whether or not it is formerly invoked with the result that it becomes more and more difficult for the Congress to get information.

In other words, the claim, the assertion, and on occasion the formal claim has had a chilling effect upon the ability of the Congress to get information.

For instance, this committee undertook a survey of committees of the Senate and the House in the last 10 years and their experience in this respect. There were 170 instances and we have the record, as a matter of fact I think it has been put in the record of this hearing, 170 instances in the last 7 years in which information was withheld without a formal claim, instances of foot-dragging, instances of schedule convenience, instances of the total ignoring of a request for information.

Mr. RICHARDSON. I would just say, Mr. Chairman, that the fact that there have been 170 instances which did not get raised to the

level of invoking executive privilege may be used to prove precisely the opposite point, that on the whole the situation does work fairly well.

I have now been in four departments in this administration and I have dealt with almost all of the congressional committees by now, and in every single instance we have been able, I think, to work out on a reasonable basis an understanding with respect to the furnishing of information. In no case that I have ever been concerned with has executive privilege been invoked. There has been, it is fair to say, a number of situations in negotiation over the scope of what would be made available, negotiation over the conditions under which it would be held, or disclosed, or nondisclosed by the committee.

But it seems to me that this is the kind of process that ought to take place recognizing that the branches are after all separate and do have under the Constitution distinguishable functions.

It would be easy to manufacture instances in which, for example, the executive branch requested information of the Congress, which we don't even think of doing.

Senator MUSKIE. You made that point a couple of times. Now, let me put the other side of that coin. In the first place the executive branch is made up of 2.5 million people, all of them implementing programs outside of the purely constitutional functions, all of them exercising functions under programs created by the Congress, which in the first instance, has the responsibility for creating them, for oversight, for appropriating, for their year-to-year operation. We are called to account by our constituents.

More than that, the history of the British Parliament indicates that one of the two most significant powers of the legislative branch is the power to investigate not only the operations of the executive branch but anything to do with the legislative authority of the Congress.

Now, that is a definable, visible, clearly stated function of the legislative branch.

Mr. RICHARDSON. Not stated, it is implicit.

Senator MUSKIE. The legislative responsibility is clearly stated.

Mr. RICHARDSON. Yes; but the power to investigate is not.

Senator MUSKIE. The power to investigate was fully discussed in the Constitutional Convention, recognized in the Constitutional Convention as being implicit, and the legislative power was explicitly given to the Congress.

It was given to the Congress with the full understanding on the part of the Constitutional Convention that investigatory powers were part of that.

Mr. RICHARDSON. No question.

Senator MUSKIE. Now, what I am trying to get out of the administration is some notion of the extent to which Congress's power to investigate exists at the sufferance of the President and to what extent it has authority which the President cannot challenge, to get at facts, to get information with respect to the operations of the executive branch which the Congress created in large part in the sense that it created the programs, authorized the personnel, provided the money for it to operate.

Now, to what extent can the Congress claim the right to get information in a way that cannot be challenged by the President?

Mr. RICHARDSON. The only possible answer to that, Mr. Chairman, is that the power of the Congress to obtain information from the executive branch in order both to legislate and to exercise oversight of the implementation of legislation previously enacted is extremely broad and information has been furnished during this administration—for example, in 4½ years, in millions of instances I have personally spent hours of every week before the Congress furnishing information and if you add to that information furnished by other personnel in the departments where I have worked, this of course is a continuous process.

During this same period in only three instances has executive privilege been invoked. Now there are, to be sure, cases where Congress has sought more information than it received but one would want to look into the 170 instances you cite to determine to what extent, if any, the legislative process was impaired by not getting all the information initially requested, or even the extent to which the committee chairmen and members of the committee felt that they had not received an adequate amount of information.

Senator MUSKIE. That is the question, Mr. Attorney General, who is to decide?

Mr. RICHARDSON. I don't know, I just say I don't know the answer to this and I take it the mere enumeration of 170 out of millions of cases doesn't in itself establish that the Congress is not getting adequate information.

Senator MUSKIE. Mr. Attorney General, I am not impressed by the argument because the issue isn't created by the normal flow of millions of words of information.

Mr. RICHARDSON. What does create it, Mr. Chairman?

Senator MUSKIE. Between the executive branch and the Congress the issue is created when the Congress decides that a piece of information is relevant and the President challenges that decision.

Now, I agree—

Mr. RICHARDSON. He has only done it three times.

Senator MUSKIE. I agree. The chilling effect is what we are talking about, and there has been the chilling effect. You have made your rationalization of the 170 instances, I think the rationalization is otherwise, but we don't have to resolve that difference of opinion in rationalization.

To get to the heart of the question, does this administration, or do you, concede that the Congress has power under the Constitution and its investigatory powers to get information over the opposition of the President at any time, under any circumstances, under any guidelines or rules?

Mr. RICHARDSON. If you are asking me, Mr. Chairman, to tell you that there is no such thing as executive privilege and that the President may never refuse to furnish information to the Congress, I really cannot agree to that.

All Presidents have on limited occasions refused to furnish information to the Congress and I certainly cannot, as one Attorney General, or the 69th as it so happens, in what I trust will be an infi-



nately long series, sit here and in effect give away the position of all Presidents today.

There is a very limited range of cases where they have said that the separation of powers requires that they maintain confidentiality of information.

Senator MUSKIE. That wasn't the thrust of my question, and I think you know it wasn't. I didn't ask you to throw away executive privilege; I asked you to tell me whether in your judgment the Congress in the exercise of its investigatory power under any conceivable circumstances can request information that is legitimate to its function and the President can refuse.

In other words, must the Congress in each and every instance in which it requests information have to yield to the sufferance of the Executive to get it?

Mr. RICHARDSON. I am not sure I understand your distinction between what you have just restated as your questioning and what I just answered.

Senator MUSKIE. If you can't then we are in trouble.

Mr. RICHARDSON. Well, if you are saying, as I understood you, you asked can I give you the assurance that the Congress in the exercise of its investigatory function may in each and every instance be assured that the President—

Senator MUSKIE. I asked you if there was any instance in which you thought that the Congress could insist on its right to the information over the objection of the President, any instance at all.

Mr. RICHARDSON. It would seem to me that there are certainly cases where it is so implausible that the executive privilege would be asserted that Congress has only to ask; this is the normal case.

Senator MUSKIE. In other words, the President graciously accedes?

Mr. RICHARDSON. I would put it the other way around as I have tried to do in my testimony both written and in response to questions that the executive privilege is a rarely invoked privilege applicable in a limited range of situations.

Now, if you ask me are there any types of information that are inherently by definition not subject to it, then I don't know how to answer that.

I would suppose that there certainly are vast areas of information with respect to which I cannot conceive the President seeking to invoke executive privilege and one way of answering it would be to say that as to all those situations in which it is so inherently improbable that it would be asserted, that it is possible to say, I suppose, the Congress has an inherent right.

But we are dealing in abstractions, it seems to me, which don't decide concrete cases.

Senator MUSKIE. Oh, no, no, no, we are not dealing just in abstractions. I can recall last year trying to get information from the Environmental Protection Agency with respect to its advice to the President on the veto message; I couldn't get it. Not only couldn't I get it at the time but I couldn't get it subsequently. I managed to get it through devious means. We found it very difficult to get information that was circulating in the executive branch with respect to

the SST. We had great difficulty in getting information that was circulating in the executive branch with respect to the Alaska pipeline.

I had great difficulty in getting from EPA the substance of its initial request for appropriations for the next fiscal year. It insists on asserting the President's final recommendation as being its own, and I don't get the benefits of its first judgments which it seems to me are relevant to the legislative process.

And I could go on—I am not presenting a net to you, Mr. Attorney General. If you look over the growth of secrecy, of withheld information in the executive branch since World War I, the story is a full, and I was going to say, rich one—but full, it isn't rich, and it goes far back beyond this administration. We are not talking partisan politics; it grew under President Johnson and it grew under President Kennedy; it grew under President Eisenhower. What we are talking about is a tendency that all historians can predict in any government and that is the tendency for the urge for secrets to grow in almost any government and it has happened in our classification system.

It has done it through the expanded assertion of executive privilege; whether or not it has been formally invoked it has happened by the simple withholding of information, making it more difficult to get information, the dragging of feet to chill Congress' desire for information.

All you have to do is be a Senator for 15 years as I have been to detect this growth. Now, what I am trying to get at, and I think it is time we got at the point of how we balance the legitimate needs for confidentiality, how we define them, how we balance them against the values that you articulated in the first part of your testimony, the need for free debate and full disclosure, proper discussion of alternatives and so on. We need to strike a new balance; to pretend that we do not, I think, is to ignore a very real danger.

Now, all I get from you, and I understand why—and from your predecessor when I try to get some clear definition of what you think of the scope and the limits of executive privilege—you just do not want to define it; you would rather see it grow. You would rather be in a position to control its growth and its application, fully understandable point of view, but I have never yet gotten out of you, either one of you, a definition of what you think of the proper limits or scope of executive privilege.

Mr. RICHARDSON. Mr. Chairman, you are obviously entitled to your own subjective impressions of the growth of the process of secrecy. I do not feel, however, that you are equally entitled to characterize my own subjective attitude with respect to the disclosure of information to the Congress or the public.

Senator MUSKIE. I would agree with that and I am glad to have you articulate that attitude.

Mr. RICHARDSON. I think my statement can fairly be stated or summarized as saying that the burden should always be on the executive branch to justify nondisclosure, that I believe that we can do a better job in administering the Freedom of Information Act

through the Justice Department leadership that would encourage both more uniform and more liberal interpretations of the act.

I have said that a significant means of protection against the abuse of the classification process is the machinery established by the President's Executive order whose specific function is to guard against the tendency to overclassify and I have said that I thought we ought to take a new look at the penal provisions applicable to disclosure of classified information in order to assure the soundest possible accommodation between the competing interests involved.

And finally, although your impression as to the attitude of the executive branch is one I have no basis of challenging, I can only say that in my own case from 3 years in the executive branch in the Eisenhower administration and 4½ years in this one I have worked with a great many congressional committees and generally I think we have been able to approach questions of the availability of information on a basis that was reasonable, and sensible, and respectful of the congressional functions.

Senator MUSKIE. Well, there is no point in belaboring that difference then. Let me ask you the next question.

You say that you think, and as far as I know this is the first time I have heard the statement made, you think that executive privilege or the power to invoke it can be delegated by the President. I think that is a new assertion.

Mr. RICHARDSON. No, I don't think so, it was formally done in the Eisenhower administration in the first term. The result was a rather large number then of invocations of the privilege as discussed in the Library of Congress study and the George Washington Law Review article which I am sure the committee has.

I suppose the thought here is simply that if the protection of information is inherently subject to the executive authority and if that authority rests ultimately with the President, he may delegate it in this area as he does in others.

In any event in this administration, in the second part of the Eisenhower administration, as far as I know in between, it has been expressly understood that the privilege could only be invoked by the President.

Senator MUSKIE. Do you think that is a limit upon the power?

Mr. RICHARDSON. I think it is, rather, a desirable procedure; I don't think that other officials in the executive branch should feel that they have the authority delegated to them to invoke the privilege.

Senator MUSKIE. There again we leave it to the President to decide either that the executive privilege is something personal to him or it is delegable.

Mr. RICHARDSON. I think it is delegable. Just as any executive authority is delegable, but I do not think it should be delegated.

Senator MUSKIE. In my judgment that is an expansion of it, certainly far beyond anything that was claimed before President Eisenhower, and I was not aware of the extent to which it appears to have been delegated under him.

Let me put this to you, even after the reduction in numbers of people who can classify, there are still 18,000 in the executive



branch, if my recollection of the numbers is adequate, who can classify information.

Now, if the President can delegate executive privilege presumably he could delegate it to 18,000 people—you know, the abuses, the overclassification that that kind of practice has produced?

Mr. RICHARDSON. But I submit, Mr. Chairman, that the working of our system depends upon the exercise of wisdom and judgment.

Senator MUSKIE. It also depends upon a Constitution.

Mr. RICHARDSON. The Constitution which is very broadly written and which is as silent on the subject of executive privilege as it is upon the legislative power to investigate. Both I take it rest on essentially the same footing.

Senator MUSKIE. I don't think so, there was nothing about the executive privilege in the British experience; the power to investigate comes from that. Executive privilege was not mentioned in the constitutional debates.

Mr. RICHARDSON. The British do not have a system of separation of powers.

Senator MUSKIE. Exactly, so there was no precedent for it, so how can you say that it was implicit? It wasn't discussed in the Constitutional Convention; it is something that has grown, and indeed the phrase "executive privilege" did not come in the language until the Eisenhower administration.

Mr. RICHARDSON. The power invested in the President as Commander in Chief or to conduct foreign relations implies a power to keep secrets in situations where the national interest would be impaired by the disclosure. I think that this is all that is meant.

If we are negotiating a treaty, for example, and have developed a fallback position, surely it is implicit in the power of the President to conduct foreign relations that he cannot be forced to disclose this publicly.

Senator MUSKIE. Mr. Attorney General, you and I are going to have very little difficulty in finding that application in executive privilege.

What we are talking about on the basis of your testimony this morning is the power of the President to delegate this executive privilege authority to anyone in the executive branch for any purpose, not negotiating a treaty, but for any purpose named in withholding information from the Congress; and whether or not the exercise of that kind of power is going to be entirely within the discretion of somebody in the executive branch or whether or not the Congress should have any right to challenge it effectively and to insist upon its investigatory powers. If all we are talking about is the conduct of foreign affairs and defense it would take very little time, I can assure you, to arrive at a definition.

Mr. RICHARDSON. I don't know, Mr. Chairman, I sense—well, let me put it a different way. Whether or not as a legal proposition the President has the power to delegate the authority to invoke executive privilege is not to me the significant question. The question is whether it is wise if he does have that power to delegate it.

Now, I don't know how legally, as a matter of construction of an implied executive power in the first instance you would read into the first implication a second implication which is can it be delegated.

Normally a given authority vested in one individual can be delegated unless some express provision in the law prevents him from delegating it.

Now, since we are not dealing in this context in any written law whatever and no court decisions, my answer to your question is based simply on the normal situation that would apply to the power to delegate authority.

I would be against doing it and I do not want to create an issue between us over a question of law on which neither of us can invoke any authority as to which in any event we are agreed as to what the desirable results should be.

Senator MUSKIE. Mr. Attorney General, I think my point of difference with you can be underlined in just this way, that the abuse of any other delegation of authority cannot be discovered, disclosed, identified or restrained if the disclosure of information is itself controllable entirely by the executive branch; that is the whole point.

From the British experience, the legislative branch acquired the power to investigate because it was the only way it could get at the abuse of authority by the king, or the executive branch.

Now, when the Parliament was denied information it could not prove one thing or another about the abuse of authority. So, sure, all of the authority can be delegated but if it is abused, the only way we can determine whether it was abused is to have Congress with the power to investigate and get the facts on its own as a matter of right and responsibility under the Constitution. And there is where you and I disagree.

In order to expand this, as long as you make executive privilege dependent upon the President's personal assertion of the privilege then the restraints of his person—he was elected by the country as a whole—the restraints of his person are some protection. But when you say he can delegate it to 18,000 or more faceless appointees of the executive branch, then what you are doing is closing the doors of information to the Congress even more than they are now potentially. And it is the potentials, Mr. Attorney General, you know as well as I that this is a system of checks and balances and it works because it is a system of checks and balances.

And yet in this field of information you deny the Congress the right to check in any meaningful way any arbitrary denial of information by the Executive.

All that we are asking for in the legislation before us is the setting up of a system for checking the Executive when it abuses or arbitrarily uses whatever authority it has to withhold information. And so to get at establishing that kind of system you have to first know and have some comprehension of what the scope of the President's power is in the first instance, and then you have to agree on the mechanism.

Mr. RICHARDSON. Mr. Chairman, I do not fundamentally disagree with anything you have said. I believe that the Congress must have power to investigate; I think this is inherent in the system of checks and balances.

I don't believe that the President should delegate the power to invoke executive privilege. I think that the executive branch should be

responsive to the awareness that Congress does have the need for information in order to legislate and to exercise power of oversight.

It appears to me, as far as I can see, the results that we would achieve are perfectly consistent.

Senator MUSKIE. Well, if you don't think the President should delegate, would you object to legislation that would deny him the right to delegate?

Mr. RICHARDSON. I would have to say first of all, well, I would not object to it; I would have to say that it presumably would not be valid and enforceable because by definition it would attempt to constrain a constitutional power.

Senator MUSKIE. Well, you and I disagree on that. Let me ask you one other question on executive privilege. What would you say to legislation which required that information cannot be withheld from the Congress unless the President invokes executive privilege?

Mr. RICHARDSON. I think this could disturb the kind of comity that we have arrived at.

Senator MUSKIE. Well, I am unhappy with the state of comity, I want to say that.

Mr. RICHARDSON. Well, I encourage the circulation of a confidential poll, Mr. Chairman, to the chairmen and the members of all the committees that I have dealt with asking them to check the box on "happy", "very happy" "very very happy" and "unhappy", "disturbed" as to their dealings with me—

Senator MUSKIE. I think you ought to wait a month or two before you circulate it.

Mr. RICHARDSON. Yes, perhaps.

Senator MUSKIE. Maybe I haven't had a happy experience with you; I simply haven't had that kind of experience.

Mr. RICHARDSON. Well, I haven't been in quite the situation at the Justice Department either where investigative files for example are undoubtedly going to be a problem in dealing with the Congress and I haven't really fully worked out yet what I think ought to be the relationship in which we deal with the Congress. But I would say in essence that the considerations which affect the disclosure of information and investigative files are fairly common sense considerations; they involve fairness to individuals and they involve tipping off the subjects of investigation.

Now, these are considerations which a Member of Congress is just as well able to recognize as I am and he therefore would share with me the same reasons for nonpublic disclosure. And what I would hope in the ordinary course to do is to make available information to the extent he really needs it in order to do his job.

This is generally the approach I have taken and it works pretty well. I would think that from a standpoint of the risk of leakage which could prejudice an investigation or an individual, that he ought not to ask for more information than he really needs because the more widely circulated it is the greater the risk of leakage.

And normally this ought to be recognized as a valid consideration, it is. I have been in the two departments that deal with most classified information for example, State and Defense, and I cannot think of any situation in which the information requested by a committee was not made available to the committee.



There have been many situations where there has been haggling over what would be made public and sometimes transcripts for example have been the subject of a lot of editing to determine what could be released.

Well, I am expressing what is essentially a point of view and I assure you that I approach the Congress with not simply lip service to the proposition that it has a job to do as a coordinate branch of government but, with I hope, the full understanding and the belief that it is so and with a determination to try to help make the system work.

Senator MUSKIE. Of course your points of view which you expressed have considerable validity because of our respect for your own integrity and ability, but let me say this, that there are of course sensitive areas which the Congress recognizes and the executive branch recognizes. And we could focus on those more effectively—you know, if we didn't have to deal with the claims for excessive authority.

Mr. RICHARDSON. I agree with that.

Senator MUSKIE. And I am sorry that so much of the dialogue is in that area. So, let me turn to the questions that I have developed here to get at the question of espionage and classification and the rest in the spirit of my prepared statement. That is, can we identify some values, standards, and objectives that would enable us to work out language problems that we see in the legislation? That is the question that I would like to get at.

Senator CHILES. I have been questioning the Attorney General for quite some time. If you would like to ask some questions I would be happy to yield to you at this point and I will wait and ask my other questions after you are through.

Senator CHILES. If I might briefly, Mr. Chairman, I appreciate that.

Senator MUSKIE. Yes, of course.

Senator CHILES. Mr. Attorney General, I have had a chance to read your statement; I didn't get a chance to hear your statement. I want to say that the tenor of your statement sounds much different from some of the statements we have heard previously in the committee and I am delighted to see that.

Your mention of the need of comity in the area, I think is something that is essential and probably the reason that this question has not reached the kind of crisis situation that we find ourselves in now in the history that we had prior to this time was because I think there was an understanding, or there appeared to be, between the legislative and the executive, and this was an area that was hard to define.

I think we are wrestling with whether or not you can define it by law and how we can try to define it by law. But we are in the dilemma of not knowing what else to do when we were faced with the situation in which the last Attorney General said that he saw no limitation from the charwoman who sweeps the halls if she were told not to appear and not to testify she could not, and if he were told not to appear and not to testify regardless of what the subject was, he would not, period. And of course we were left as he said with an impeachment as our only remedy.

And that is the kind of thing, I think that certainly forced Congress to determine that we had to have a stab at trying to legislate on the subject.

And our concern now, while your statement is very general on the area of executive privilege, I think that it still demonstrates a willingness to look at this area on a step-by-step basis. And I think we know what Congress needs essentially is some assurance that this is the way that we are going to work on the thing, that we are not going back into this area that executive privilege can be used for anything and cover everything. I think that that is our concern. I have not posed much of a question to you.

Mr. RICHARDSON. Well, I agree with the general philosophy of your observation. I only say that I would hope to do my part and bring about that kind of mutual understanding.

Senator CHILES. The other thing that has been of great concern to the committee, I think, and that is the number of times that we find information is refused to the Congress without ever giving the Congress a reason.

While the President has said executive privilege has only been used a certain number of times we have received now from our compilation—it appears that even the Presidential executive privilege has been used more than that. We run into all these other instances in which we have asked the committees now, what is the number up to now, Mr. Chairman?

Senator MUSKIE. 166.

Senator CHILES. 166, something more or less, that we find refusals, many of which never even saying executive privilege just simply refusing. Now where does the Congress go when that happens, be it information in regard to an AID loan, or be it information from the State Department, or be it information from HEW or any one of these areas that they simply refuse?

Mr. RICHARDSON. Well, I think the next step is for the Congress to find some means of insisting. I have occasionally had, for example, communications from the subcommittee chairman or a chairman in the case where he hadn't been able to work out the disclosure of information with an agency head in the department where I worked and we have often in those cases been able to arrive at a resolution that did make the information available.

I think that if I were to refuse in the case where a committee chairman or subcommittee chairman thought I was wrong and unreasonable that the chairman ought to be able to escalate the matter to the President so that the President either then overrules me or the agency head concerned and/or he does exert the executive privilege explicitly. But I know of no way of dealing with the case where a committee feels that an executive branch representative has not properly refused to provide information.

In any case or any situation where the committee does feel that the refusal was unjustified I think it ought to escalate the matter and make some noise about it, get it up higher.

Senator CHILES. I think what we are searching for is some kind of a procedure or some kind of a way to do that, realizing now that in this kind of crisis we now are finding out how many times it has

actually happened. And when the crisis is over what happens if you are just back to your subcommittee chairman or something and you are trying to get some information and you begin to find again that you get all of these refusals and the crisis is kind of over and you cannot get anybody's attention.

Now, that has been building up over a period of years and I think that is why we are determined that now that we have the issue we are going to make some resolution on this so we will not be right back in the same situation.

Mr. RICHARDSON. Well, I am not sure that the matter can very effectively be dealt with by statute as between the branches. I think that, after all, the theory of the separation of powers was that it was important to divide power since anyone vested with it could be assumed to want to try to expand its exercise. And I take it therefore that the subdivision into three branches required the psychological assumption that each branch would exercise the jurisdiction entrusted to it aggressively and if that doesn't happen we have had periods in our history where one component or another was not fully exercising its powers vacuums have developed and the Government as a whole does not work as well.

I think part of the responsibility of Congress is to assert its own prerogatives. So, I don't think, in other words, the solution really depends on an attempt to write a new law in the area of the division.

Senator CHILES. That is one way that Congress asserts its responsibility in this privilege.

Mr. RICHARDSON. Yes; except by definition the effect of the law is to limit executive power and the law is by definition unconstitutional.

Senator CHILES. To the extent that the law attempts to define congressional power.

Mr. RICHARDSON. I cannot see any way in which the Congress can bootstrap itself into an enlargement of its own powers by passing the law.

Senator CHILES. But the Congress perhaps might be able to limit an encroachment upon its power by the Executive.

Mr. RICHARDSON. Well, conceivably the most you might achieve is some sort of expression of policy which, giving the background of its history and perhaps supported utterances from the executive branch and so on, might serve as a sort of guide some day to a court confronting the issue. But that seems to be the most it could do.

Senator CHILES. Also, the law itself, if we pass such a law, becomes a test for the court to try to determine.

Mr. RICHARDSON. To be sure.

Senator CHILES. And the way it is now or the way that it has been, we might as well have that test; we are losing on every field today.

Mr. RICHARDSON. While the chairman, Senator Muskie, was reciting a history of instances designed to show that the Congress is losing on every field, I frankly, having served—for 2 years as an assistant to a committee chairman the last time the Republicans had a majority up here.



Senator MUSKIE. There has been a lot that has happened since then.

Mr. RICHARDSON. But I am not sure——

Senator CHILES. I cannot remember when that was.

Mr. RICHARDSON. No, seriously, from where I sit I do not see the evidence of the loss of congressional prerogative. I have been told by previous Secretaries of Defense, for example, that there has been a steady gain—if gain is the right word—a steady growth.

Senator CHILES. You have just added to my discomfort, if you don't see the loss then I——

Mr. RICHARDSON. I suggest you might send the questionnaire to Secretaries of Defense and ask them how much more information is now being demanded from the Department of Defense than has ever been sought before.

Take for example the Comptroller who just resigned after 20 years or 25 years in the Department, Bob Moot, during the whole period that he has been there in the Comptroller's Office—he had some time out in another agency but his acquaintance with the Department goes over that period—during that entire period the volume of information and the detail of reporting required by the Congress has steadily increased.

And in comparing my own tenure in HEW 15 years ago with the situation now, Congress is substantially more aggressive in demanding information. You have a lot more staff up here now than you used to; each Senator and each committee is more fully staffed, and every staff member is generating questions for the executive branch.

We spend an enormous amount of time responding to this kind of thing. But you cannot prove a case, I really believe, either by the accumulation of my subjective impressions or yours. But I think that the notion that Congress has been giving ground to the executive branch is largely a myth.

Senator MUSKIE. In the critical areas of public policy making, the last 10 years, foreign affairs, defense, and some others.

Senator CHILES. Part of those questions of defense are because of two Presidential wars that the Congress was trying to find out about.

Mr. RICHARDSON. No; but I am speaking of the general practice. Take for example weapons systems acquisition, the amount of information that is made available to the Congress at each stage of the weapons systems acquisition process today is essentially greater.

Now, I am not quarreling with that result; I think you have good reason in light of some of the major weapons systems contracts to demand the information.

I am simply saying that from where I sit the proposition that the poor old Congress has gradually been giving ground to the executive branch has not been established.

I can make a considerable and I think quite persuasive case to the opposite. Take foreign relations, now the glorious period of the Foreign Relations Committee that everybody cites was the period of Chairman Connolly and the building of the post-war structure of treaties, alliances, commitments, and so on. Obviously the Foreign Relations Committee had to be heavily involved in a process that required its affirmative action on treaties.

Senator CHILES. Yes, sir, now we don't have treaties, we have executive agreements.

Mr. RICHARDSON. And we have a steady process of contraction of United States overseas roles, no new treaties except in the arms limitation area.

Senator CHILES. We don't have treaties anymore, we have executive agreements; we do it that way and we don't have to go to the Congress.

Mr. RICHARDSON. The role of the United States abroad has been contracting for at least 10 years. Now in that situation there is simply less for the Senate Foreign Relations Committee to do than there was when you were forming NATO, SEATO, entering the United Nations, seeking Connolly's and Vandenberg's judgment on the Charter of the U.N. and so on; we haven't been in that.

Senator MUSKIE. When you couple with that, Mr. Attorney General, the fact that the Secretary of State now resides in the White House under a different title so he cannot be summoned up here on the Hill at all and the fact that we read about agreements, nine of them last week, being signed by the heads of state of the Soviet Union and the United States that don't take treaty form or executive agreement form. I mean, all of this activity goes on outside of our range of jurisdiction and operations.

And the Presidency has been apparently working to expand the activities outside our range.

I mean, here we have had three important initiatives in the last 18 months that the President sets great store by, that he has gotten bipartisan support for, that he has been praised for, one in Peking, and two with the Soviet leadership. And almost nothing that has happened in those three meetings is subject to scrutiny by the Congress, is subject to approval by the Congress, is subject to examination by the Congress, except to the extent that Mr. Kissinger from time to time offers to come up here and brief us off the record. You know, by sufferance this is what they do.

Mr. RICHARDSON. The only thing specifically, these were steps involving relaxation of tensions.

Senator MUSKIE. I am all for relaxing tensions.

Mr. RICHARDSON. The new commitments arranged were within the arms limitations field and they were submitted to the Congress. The ABM Treaty was, of course, subject to ratification.

In any event, I am not trying to prove a case, I am only trying to make the point that I do not think the contrary is proven either.

Senator CHILES. Well, 25 refusals—

Senator MUSKIE. Senator Chiles, we have a roll call vote.

Senator CHILES. [continuing]. Twenty-five refusals to the Foreign Relations Committee in the period from 1970 to 1972 just does not seem like it is a decelerating number of requests.

Mr. RICHARDSON. I do not know what the date comparison was, nor do I know what information was furnished or what happened following the "refusal." Often there is a refusal followed by a period of negotiation in which the committee ends up getting substantially the information it needed. So, one would need to know, I think, what the context was and what happened to know to what ex-

tent if any the committee—I know of no situation in a year and a half in dealing with the Foreign Relations Committee in which the committee was denied information it needed.

I remember situations where there was a good deal of argument about it but they ended up with the information they needed.

Senator CHILES. That they needed, now who makes that determination as to whether they need it?

Mr. RICHARDSON. I assume that if Senator Fulbright had not been satisfied or Senator Symington had not been satisfied he would have pushed the matter further.

Senator MUSKIE. I think Senator Fulbright has thrown up his hands, frankly, about the whole matter and if you would ask him I do not think you would want to circulate your questionnaire to him.

Mr. RICHARDSON. Well, I would not mind, as far as any situation which I know of.

Senator MUSKIE. He would pay high tribute to you and to the fact that you are a nice guy to get along with, but on the process he would give a very low mark.

We have a roll call vote, Mr. Attorney General.

Now, I have a lot of questions of the kind I have characterized. Would you be able to come back this afternoon? It is now almost 12:30, it will be 12:45 before I can get back from the floor and I would like to get into those questions.

Mr. RICHARDSON. Yes, I could do that.

Senator MUSKIE. What time could you be back?

Mr. RICHARDSON. Two o'clock.

Senator MUSKIE. I will try to wipe it up in an hour. We will not go over this ground again, we will go over the background.

Mr. RICHARDSON. I thank you very much.

Senator MUSKIE. Thank you very much.

[Whereupon, at 12:15 p.m., the hearing was recessed, to reconvene at 2 p.m., this same day.]

#### AFTERNOON SESSION

Senator MUSKIE. I think there is a reasonable chance that we can have an uninterrupted hour or an hour and a half if we need to take that time. And so I would like to go through these questions which we have prepared in advance to try to shape up some kind of either difference of opinion or agreement, or maybe a mixture of both on what we think should be the thrust of legislation dealing with the classification and secrecy laws generally, including S. 1400. But I am not going to focus specifically on the details of that legislation because I think that we can perhaps cover more ground and maybe avoid minor differences of opinion in another way.

So, let me put before you two or three questions which I think tend to amplify each other. Would you think it sufficient for the law to define classical espionage, as opposed to other possible offenses, as the obtaining of information or the attempt to obtain and the transmission of information or the attempt to transmit it for the purpose of aiding a foreign nation or doing injury to the security of the United States?



I think maybe the next question would put that in kind of a perspective light. Do you think it is necessary, assuming the malicious purposes which is the thrust of the first question, to characterize in any specific terms the kind of material or information to be obtained or transmitted? Should not any covert foreign agents be penalized regardless of how successful he is in getting defense secrets?

#### CLASSIFICATION AND ESPIONAGE

Mr. RICHARDSON. I take it that under the first clause you read, the crime would be established by proof that the defendant had obtained and transmitted the information provided it was also shown that it was for the purpose of aiding a foreign nation or injuring the security of the United States?

Senator MUSKIE. That is right, if you have in other words, a malicious purpose or the malicious or covert purpose of aiding another nation or injury to ourselves, would not this be the simplest definition of espionage to say that that is sufficient to establish the penalty?

Mr. RICHARDSON. Yes; that sounds right, Mr. Chairman. I think, of course, the character of the information might contribute in some instances to establishing the intent for which it was transmitted. If it were defense-related information, then its transmission would tend on its face to be done for the purpose of aiding the other country or injuring the United States.

So, I think the answer is, this sounds right to me, this ought to be sufficient.

Senator MUSKIE. So that although the kind of material or information, and I would agree with you, might make it easier to establish the intent, it is not necessary to characterize the kind of material or information in order to establish the guilt?

Mr. RICHARDSON. That sounds right.

Senator MUSKIE. Now, with respect to the penalties in such a case, from expulsion to detention to execution, if that is ultimately sanctioned, should not the penalties be varied according to the diplomatic situation existing between his country and ours, according to whether we are at war or at peace or whether we are, through our allies, on opposite sides of a major international controversy.

Mr. RICHARDSON. Certainly the question whether we are at war or at peace ought to vary it and I would think certainly also these other considerations should be taken into account in imposing sentence. Whether it is desirable to grade the relations between the United States and another country in a peacetime situation is a new question to me.

I certainly think ideally all the circumstances you suggest should be relevant to disposition and the only remaining question really is whether in the administration of justice it is possible to establish proof with respect to these differences.

Senator MUSKIE. Getting next to the character of the information involved itself, assuming that we can identify very specific categories of information such as plans for defense installations, cryptographic techniques, weapons, blueprints, or schedules for troop move-

ments, scientific developments which disclose our intelligence-gathering capabilities through electronic or photographic means, assuming we can identify such forms of information which we would agree cannot be disclosed to anyone without authorization, should we try to develop such a clear listing of those categories that no one coming into improper possession of information about them would have the least doubt about the crime involved in transmitting this knowledge?

Mr. RICHARDSON. Certainly that is a desirable goal. I take it that is the purpose of the definition of defense information in S. 1400 itself.

I have some difficulties with that definition but I think the idea of trying to do that clearly is a good idea.

Senator MUSKIE. In the light of your favorable answer, would it be possible for you to provide us with a list of those categories?

Mr. RICHARDSON. Yes; we would be glad to try to do that.

Senator MUSKIE. Could you define for statutory purposes, the method by which authorization to disclose such information should be sought if the possessor thinks it essential for reasons of public policy that the information be disclosed?

Mr. RICHARDSON. Yes; here of course, Mr. Chairman, it may be important to point out a distinction that I am sure has been implicit in this series of questions and that is the distinction between the transmission of information to another country for the purpose of injuring the United States, and obviously in that instance the issue of authorization to disclose cannot arise. The issue of the authorization to disclose, I take it, applies in cases where a person having authorized possession of information which may be subject to some restriction, formally classified for example, believes that it should not be and should therefore be able to disclose it.

In that instance, passing for the moment the question of the availability of its improper classification for defense, I think at least he should be able to invoke the kind of administrative process which is provided for in Executive Order 11652.

Senator MUSKIE. That you described this morning?

Mr. RICHARDSON. Yes; which provides for a process culminating in a review of the legitimacy of the classification outside the classifying agency. I think that is an important final step lest there be an element of ingrown defensiveness in justifying the classification.

Senator MUSKIE. Now, going beyond, is it possible that the possessor, the authorized possessor of such information might not be a government official?

Mr. RICHARDSON. Yes; it is possible, it could be a government contractor for example.

Senator MUSKIE. How would we deal with that situation?

Mr. RICHARDSON. I think it is sufficient to use the term "authorized person" throughout and to treat the person who is authorized on the same footing, no matter whether they are employed or otherwise authorized. And there is a definition of authorized in S. 1400, and all it says in effect is that authorized means with authority to have access to, or to receive, or to possess, or to control given information as a result of the provision of the statute, or Executive order, or a regulation or rule thereunder.

That sounds all right to me, at this writing in any event. If a person is authorized in that sense it would seem to me, not controlling what their employment status was.

Senator MUSKIE. But they should be subject to the same procedures?

Mr. RICHARDSON. Yes.

Senator MUSKIE. For the purposes of this question?

Mr. RICHARDSON. Yes.

Senator MUSKIE. Going beyond the specific military categories I have suggested, what mechanism should the law have for weighing the conflicting claims of secrecy for ongoing diplomatic negotiations, for example, against a knowledgeable official's or journalist's conviction that the details of those negotiations must in the public interest be made known?

Here we come to the question of intent, should the person who decides to disclose such material be allowed an affirmative defense that he acted for the public good?

Mr. RICHARDSON. I think the short answer to that is no. I think that the defense of good motives is subject to such vague standards that I would think it would be very difficult to admit that defense.

I think therefore that a better course is simply not to prosecute the person who publishes and restrict the power to prosecute to the unauthorized disclosure that may make information available to a newsman but not subject the newsman who uses it to a criminal penalty.

Senator MUSKIE. But the official who discloses it should be subject to a criminal penalty, whatever his motives?

Mr. RICHARDSON. Yes; that of course raises the question of whether or not the person who discloses it should have a defense not of good motives but of the impropriety of the classification; that I think is a tough question.

As I indicated in my testimony, I find difficulty with the creation of judicial machinery for determining whether or not the classification is improper.

Some pieces of information, for example, are classified not so much because the information itself is intrinsically critical but because of the means whereby it was obtained. And so, simply to disclose what otherwise looks like a relatively insignificant piece of information may create an awareness on an adversary side that this could only have been obtained because its organization had been penetrated for instance, or because we had learned to break a code.

And, it is that kind of problem that ramifies determinations of whether or not a piece of information is properly classified. This is why I personally lean at any rate toward trying to find a mechanism within the executive branch that is objective enough and tough-minded enough in reviewing the classification process so that people both in and out of government could have confidence in its integrity.

If that were once established, and I concededly do not have that confidence now, and I think properly so, but if that confidence could be established then the kind of course I suggested of allowing a defense to an individual who had had no opportunity to have the va-



lidity of classification reviewed would be as far as you would need to go.

Senator MUSKIE. Who are likely to be the challengers of classifications? I put that question to Mr. William Bundy and his answer in something of an understatement was that any such person would be regarded as poor promotion material. Who would be?

Mr. RICHARDSON. Well, I have been involved myself within the executive branch on issues of classification in which there was a fairly sharp division, for example with respect to the release of certain types of satellite photography, and this is an issue with which people have divided for quite cogent reasons on both sides.

In any event, the regulations that do exist under the current Executive order would permit anyone to challenge the propriety of the classification.

Now, that would mean, for example, that if a journalist saw information about a current negotiation and were refused it because of its sensitivity, because it was classified, he could say in effect that that makes no sense, there have been stories in various magazines and newspapers. It would be better in the public interest at this stage to have the whole thing come out and have it come out clearly and accurately than to have the cumulative process of leakage of fragments that has been going on up to now.

And in that event he would have the opportunity to present that argument to the administrative tribunal charged with the determination of the validity of classifications.

As I say, that would be fine if you were able to establish a broad enough base of confidence and the fairness of that body in weighing competing claims of secrecy and the right to know.

In any event, that seems to me an important thing to try to do irrespective of where we come out on the availability of a defense of the impropriety of the classification.

Senator MUSKIE. It strikes me that all of the pressures are the other way, that even if such a procedure is established, and I think we perhaps ought to have such a procedure, that the inclination to take advantage of it in a meaningful way for declassification or reclassification is minimal.

Now, the other approach to it, the one that the legislation undertakes and which these questions are intended to probe is treating differently that material which can be challenged, which is challengeable in the sense that it is not clearly the kind of information we first started talking about.

In other words if it is indeed related to real defense matters so that we have established a clear category for them it rather falls into the gray area or broader area where it is challengeable.

It seems to me that in those instances a case could be made for giving a defense.

Mr. RICHARDSON. I think so. I think the argument, and it is certainly a very strong argument, has been made for it. And I do not feel strongly convinced on the undesirability of it. As I say, the difficulty with giving it is the relative unfamiliarity that any given court that happens to draw such a case is going to have with the considerations that led to the classification. And to bring all this out

could involve first of all potential prejudice through leakage, but in any event would be submitting to the court a question which is pretty far off its ordinary beat.

And that of course is the thrust of what the Waterman case that I used in my prepared statement is. And so, at the same time it does bother me to deny a defense in a case where a classification stamp has been put on a piece of paper simply as a means of preventing public disclosure of what might only have been an embarrassment to the agency.

In that event, though, the individual, under the regulation in the Executive order, is permitted a review of this although I agree, the employee is not likely to use it in the gray area kind of a situation. There it would depend on some outside person who sought access and therefore declassification.

Senator MUSKIE. I suppose in that kind of a situation we would be interested in such evidence as whether or not the defendant acted or did not act in the interest of the foreign power, did or did not act to spite his superiors, or did or did not act out of partisan motives, or did or did not act to embarrass the conduct of the policy with which he disagreed.

I suppose those are some kinds of evidence that we would be interested in examining in the case against the defendant?

Mr. RICHARDSON. Yes, this is arguable, of course. S. 1400 expressly excludes any right to show that the information was improperly classified and presumably also it makes irrelevant the motives of an individual who intentionally—that is, a person authorized to have classified information who then deliberately discloses it would be subject to criminal penalty on that showing.

And I take it that as long as it was established that the information was intentionally disclosed that you would stop there, and there is, I think, something to be said for that. If you go beyond it you have opened up a rather foggy area in which people who, whatever their original motive, unilaterally decide to declassify information who can then come forward in their own defense in a criminal proceeding and seek to establish a state of mind that might appeal to the court or jury that is justifying what they did.

And so, I think we are concerned largely with deterrence. There have been almost no cases, as far as I know, I will ask my associates here—I don't think there has been any criminal prosecution for disclosure of classified information under the present law, has there?

Miss LAWTON. Yes, sir, under 50 U.S.C. 783 the Scarbeck occurrence. But there the recipient determines whether or not it is a criminal offense to disclose. As far as a foreign agent the statute reads in terms of classification.

Mr. RICHARDSON. In any event, would this be accurate? No criminal case has ever been brought or no conviction has ever been obtained in the United States against any Government employee whose only wrong was the unauthorized disclosure to the general public of classified information.

Senator MUSKIE. That was our impression, too, the case mentioned was brought under the Internal Security Act.

Mr. DIXON. Scarbeck, yes.

MR. RICHARDSON. So, that suggests there are a lot of problems, certainly under existing law in establishing proof of any crime at all. There are a lot of problems, of course, in identifying any individual who is the source of a leak of classified information and so then it becomes important to consider.

SENATOR MUSKIE. Should there be a test of damage done by this, and should the Government, in a situation where disclosure cannot be proven too be malicious or the result of espionage, have to prove the revelations immediately or irreparably or even just seriously damage security or the conduct of foreign policy?

MR. RICHARDSON. I would say definitely no to that. I don't think that the question of damage should, in effect, be retroactively determined. Very often the date of the actual trial is considerably after the disclosure was made.

I think that the validity of the classification should be determined as of the time it was made or at least as of the date of the disclosure. And at that point it does seem to me that you do get a close question on whether or not to allow the propriety of the classification as of that date.

But, I do not think that a defendant should be allowed as of the date of trial to show that no harm was done; the classification could very well have been a valid classification in the light of all the existing circumstances. This disclosure of it might have done harm; there might have been significant risk of this and yet the fact that the risk or the danger did not actually materialize would not seem to be available as a defense.

SENATOR MUSKIE. So, you would hang it all on propriety and classification; if it were a proper classification in the first place then these other questions might conceivably go to the sentence but not to the question of guilt?

MR. RICHARDSON. Yes, I will just add a little bit more to spell out what is expressed in very summary form in this testimony. On page 32, discussing the matter of the affirmative defense in the middle of the page I say, "It may well be that preclusion of an affirmative defense is only justified when adequate procedures exist for appeal of classification." That would mean that a possible affirmative defense would be to show that the defendant did not have an adequate opportunity to get a piece of classified information removed from its classified categories.

If an individual in other words feels strongly enough that the public interest requires a disclosure, he ought to be willing to seek that kind of review.

On the other hand if that kind of review is not available to him then it seems to me he clearly should have a defense. Further, I have suggested in the next sentence that if you do provide for the defense that there was no opportunity to get reclassification of the information perhaps it also should say that there not only must be an opportunity to get a redetermination of the classified status of the information, but a further opportunity to appeal that outside the classifying agency. The same point I made earlier; this much at least it seems to me is legitimate as an affirmative defense. How adequate it is depends of course, as I said earlier, on the fairness and integrity of the administrative process itself.



Senator MUSKIE. On this question of the adequacy of the declassification procedure. Dr. Rhoads, who is acting chairman of the Inter-agency Classification Review Committee, testified last month that out of 350 mandatory review requests for declassifications since June 1, 1972, only one had originated from a Government employee and that had come from an employee of his in the Archives.

Mr. RICHARDSON. Well, that certainly gives me pause. Maybe there could be more internal attention given to the availability of this process. I might also point out that the Executive order does provide administratively for reprimand for the abuse of the classification process.

Maybe there could be established a stiffer penalty and perhaps the administrative agency could seek for some opportunities to administer reprimands for improper classification so as to reenforce that side of it.

Senator MUSKIE. You made that suggestion last month in your confirmation.

Mr. RICHARDSON. Yes; well, I find that the Executive order already has some provision for this and the question is whether it is sufficient.

Senator MUSKIE. Have you given any thought to what the penalties ought to be, that is, for abuse of the power to classify?

Mr. RICHARDSON. Well, the reprimand can, of course, be required to be entered into the personnel folder of the individual and could be required to be taken into account in the context of possible promotion for example and held to be a substantial negative factor for this. It might be provided depending on the seriousness or the number of occasions on which such a finding had been made that it be a reason for a deferment of promotion.

Senator MUSKIE. You do not think the penalties for overclassification should be comparable to the penalties for disclosing material that should not have been classified?

Mr. RICHARDSON. I do not think they are quite comparable because when you overclassify you may have for a time prevented the information from being made publicly available. In most instances the public interest would not in a given case suffer that much.

In any event if the machinery by definition is designed to create an opportunity to establish that it is overclassified then of course the other side of the coin is that there ought to be encouragement to use it.

Senator MUSKIE. With respect to the resources of the Review Committee, and I understand that it meets monthly and has a full-time staff of only one man and his secretary, is that adequate to provide this kind of oversight of classification practices?

Mr. RICHARDSON. I do not think so; it does not sound adequate to me. It is able to get along that way. My impression is that it is not being used enough.

Senator MUSKIE. I think that is the real problem, how do you generate the pressure to use the machinery? The machinery may be all right but if it is not used, there is no pressure to use it, no motivation to use it, it is not going to achieve the job. That is really what we are talking about.

Mr. RICHARDSON. Yes; of course congressional pressure could be useful here as well as journalistic pressure. One thing Mr. Dixon points out to me that contributes to the fact that the staff is so small is that normally the work of determining whether or not a classification was proper is done within each agency. And I take it the staffing you referred to of the one person, is for the staff only of the Interagency Review Committee.

I take it most such issues are determined within the classifying department.

Senator MUSKIE. Would not it be simpler and just as effective in your view to differentiate quite clearly in the law between the authorized possessor of knowledge who reveals it improperly and the recipient of his confidences who might eventually communicate them to others?

In other words, should there be different degrees of criminality for Government officials than for journalists?

Mr. RICHARDSON. I think yes; and this S. 1400 attempts to do. I think it is arguable whether most of S. 1400 is simply declaratory of existing law. I think the draftsmen feel that it is; it may be in some respects it needs to be scrutinized pretty closely on that score.

In any event, the one respect in which I take it concededly S. 1400 liberalizes existing law, is that it makes the penalty for the disclosure of classified information applicable only to the person who was authorized to have the information and then discloses it and does not make the receipt of that information or the use of it by a recipient subject to a criminal penalty.

Senator MUSKIE. This is section 1122, I think, isn't it?

Mr. RICHARDSON. No; 1124.

Senator MUSKIE. No; 1122, if I may read that.

Mr. RICHARDSON. 1122 is the espionage section involving the disclosing of national defense information; 1124 deals with disclosing classified information and the operative clause defining the elements is the one which says a person is guilty of an offense if being or having been in authorized possession or control of classified information or having obtained such information as a result of his being or having been a Federal public servant he knowingly communicates such information to a person not authorized to receive it.

Then it goes on to say in subsection (b),

a person not authorized to receive classified information is not subject to prosecution as an accomplice within the meaning of section 401 and is not subject to prosecution for conspiracy to commit an offense under this section.

In other words, the language actually makes clear not only that there is no offense substantively for this violation itself where the recipient is concerned, but the recipient cannot be prosecuted either as an accomplice or a coconspirator simply by virtue of having received the information.

Senator MUSKIE. But in 1122 you have got what seems to me to be a new test with respect to national defense information. A person is guilty of an offense if he knowingly communicates information relating to the national defense to a person not authorized to receive it.

Mr. RICHARDSON. Well, this section requires as an element of the

proof of the crime proof of knowledge that the person receiving it is aware that it is national defense information as defined.

I think that the definition is too broad, particularly when read against this section because it says a person is guilty of the offense if he knowingly communicates information relating to the national defense to a person not authorized to receive it. But "authorized" here is quite narrowly defined; "national defense" is very broadly defined. So, you could technically under that language be prosecuted for communicating information published in the *Aviation Journal* to somebody who does not come within the definition of authorization. And I think that needs to be fixed.

Senator MUSKIE. You see, that definition of information relating to the national defense includes among other things and I quote, "information relating to plans, estimates, analyses, sources and methods, plans, estimates and analyses of intelligence operations." And then you have "the conduct of foreign relations affecting the national defense". That is a pretty broad definition of national security, and when that kind of information falls into the hands of journalists it seems to me that they run the risk of prosecution under section 1122.

Mr. RICHARDSON. Yes, I think there is such a risk and I think that 1122 is too broad when read against the language of the definition.

Now, the draftsmen say yes, but there is some case law which provides a gloss on this and which in effect reincorporates into the language what is in effect a requirement that the information not be already in the public domain.

Senator MUSKIE. As I understand the present law, and maybe you could either reinforce or challenge this understanding of present law, there is a dual standard that applies to the description of this kind of information. It provides for the divulgence of information that is either one, specifically enumerated in categories that closely adhere to material that must be kept secret for defense reasons, or two, information the disclosure of which the possessor has reason to believe would harm the United States.

The reason to believe, it seems to me, is part of the present law and is omitted in section 1122.

Mr. RICHARDSON. I think the only answer to that is that the reason to believe clause has in effect been read into the law in the *Gorin* case. But I personally think that the reason to believe clause would be desirable and I have been proposing at an earlier stage in my testimony to suggest the inclusion of such a requirement.

Since then I have found other difficulties with the language and have concluded therefore that I would rather have more time. On this point at least I think it would help.

Senator MUSKIE. Well, then we share the same question, maybe not to the same degree about 1122.

Mr. RICHARDSON. Yes, I think, for example, one of the problems with it is the narrowness of the definition of authorized. Now it is so phrased that a journalist would not normally come within that phrase; certainly a newspaper subscriber would not.

So that if the information is information that falls within any of the types that are referred to here, no matter how it came into the



hands of the journalist, his communication of it as the language is literally written would be prohibited—and the question I now have is whether the additional language that I would have proposed at an earlier stage is quite enough.

I was going to propose adding at the time of the communication he has reason to believe that the information could be used to the injury of the United States or the advantage of any foreign nation. That is pretty broad, too, because the potential for adverse use is all that is involved there and query whether you should not require more than that where a transmitter of information is concerned as distinguished from a disclosure by an authorized person.

As I said in the testimony, where an authorized person is concerned that is a person who has acquired the information by virtue of his job.

Then there is a breach of trust in its disclosure and in that case it seems to me not necessary to establish that its disclosure would do harm or was intended to do harm as I said earlier.

But where you are prosecuting somebody who may be, in effect, a middleman in the transmission of information then the proof of intent to do harm seems to me to become necessary.

Senator MUSKIE. So you would say with respect to a journalist that it should be necessary to prove intent to do harm?

Mr. RICHARDSON. Yes, that is my present view.

Senator MUSKIE. Suppose somebody is guilty of simply a mistake of judgment, bad judgment, should that expose him to criminal penalties?

Mr. RICHARDSON. No, and I do not think a mistake in judgment could fairly be characterized as establishing intent to do harm, either.

Senator MUSKIE. Now, in your opinion should journalists be liable to select or blanket wiretaps for their role in unauthorized disclosures that cannot be shown to have or to be having drastic effects on security?

Mr. RICHARDSON. No, I think the answer to the question as you express it is clearly no. I am not prepared to say on the other hand that they should never be subject to wire taps.

Senator MUSKIE. I think our concern is here that if 1122 is re-shaped in accordance with the discussion we have had here, what we would achieve is a codification of present law. Is that accurate?

Mr. RICHARDSON. Yes, although I think it is argued by some that present law is capable of being interpreted to apply to communications by a journalist and I think that if we can re-shape this along the lines we have discussed that would remove that interpretation, in the absence of willful intent to do damage.

Lest there be any misunderstanding at all, the reason primarily why my testimony is as general as it is is that I really have not had what I consider adequate opportunity to become immersed in these questions of draftsmanship. And while I am giving my best judgment based on such thought as I have had a chance to give the matter up to now, I hope I will not be held to be in effect bound to any opinion I express here now.

Senator MUSKIE. I understand that, I just put my last question because my fear is that if 1122 does broaden the exposure of jour-

nalists to criminal prosecution under the law then presumably it also broadens the basis for wiretapping of journalists.

Mr. RICHARDSON. Yes.

Senator MUSKIE. So that the two are tied together and that is why I wanted to make the tie in that question and I did it a little awkwardly.

Mr. RICHARDSON. The draftsmen argue that it does not broaden the application to journalists and they argue that taken as a whole this group of sections actually narrow the application to journalists because they make it explicitly clear that a journalist is not subject to prosecution for the receipt of any form of classified information where that is simply disclosed by an unauthorized person or where no element of espionage is involved.

Senator MUSKIE. Does that exempt them from wiretapping for that very receipt of information?

Mr. RICHARDSON. No, it would not clearly determine that issue one way or another, I suppose. But so far as criminal penalties are concerned it does narrow present law somewhat because there are sections of present law under which the receiver of classified information can be prosecuted.

Senator MUSKIE. Yes; under section 1123 there is this additional language, let me read it. It is 1123 (a) (3) :

A person is guilty of an offense if being in possession or control of information relating to the national defense which he is not authorized to possess or obtain, he knowingly fails to deliver it properly to a Federal public servant entitled to receive it.

Now, I understand that the present law says that somewhat, but not quite as specifically, and that seems again to expand the exposure of the journalist to possible prosecution and to wiretapping.

Mr. RICHARDSON. It was not intended to, I am told, it was based on section 793(e) of the present code.

So far as journalists are concerned it was the intention of the draftsmen somewhat to narrow and not to expand potential liability. I think the problem is to be assured that intent is actually reflected.

Senator MUSKIE. That of course is the purpose of these question and if it is simply a question of language it ought to be possible to work it out.

I would like to get back briefly—I am not going to cover all the questions and I may submit some of them to you. I am going beyond the time that we mentioned earlier.

So, let me get to one or two other questions. Now, one thing the forms have not done is to alter the basic concept of the decision to make information secret as an area of exclusive executive discretion and we have discussed that.

The decision to classify or declassify, to downgrade or to exempt from automatic declassification, may be reviewed within the executive branch but not outside. And you have mentioned some of the problems with in camera review of classified material.

In a Freedom of Information Act case the disclosure of classified material, or in a criminal prosecution where the propriety of classification arises, might not a judge need some independent counsel or some representative of the party opposed to the Government to help him weigh a Government affidavit in support of secrecy?

Mr. RICHARDSON. Yes; I think so. In other words, I think that if the issue is made subject to judicial determination in a given case the judge should have access to the views of the opposing counsel.

Senator MUSKIE. Would it be appropriate to set up panels of such lawyers that judges could call to assure that in camera proceedings were also adversary proceedings?

Mr. RICHARDSON. Well, I think there are problems with this; there are problems under the sixth amendment with respect to the in camera process anyway, and then when you farm out part of the effect issue to another group of people I do not know what the constitutional difficulty may be. This is an area that Mr. Dixon is more aware of than I am. I would have difficulty in any event with the question of trying to create outside of the executive branch where the responsibility for conduct of defense and foreign affairs exists a group of people whose ultimate determination on the question of classification was in a sense binding on the executive branch.

Senator MUSKIE. I would like to bring our colloquy to a conclusion and maybe to a head by posing what seemed to me to be the two separate problems which underlie our discussion and maybe our differences, although I hope that our differences have been narrowed as a result of the discussion.

The first problem is this, can the Government constitutionally prosecute me for violating a standard set by unbridled administrative discussion where the administrative act itself is not reviewable in the courts as to its legality?

And, the second question, the second problem, don't we have a balancing here of two separate constitutional interests, first, the national security as determined largely but not completely through the executive branch, and second, the first amendment interests and rights of citizens?

Don't you agree that these must be balanced? And surely if there is no real national security need for secrecy in a given instance it must be unconstitutional to restrict first amendment rights of free speech about the matter and the right of the public to vigorous debate; that is what the first amendment is all about.

Mr. RICHARDSON. I certainly agree with the basic representation that the objective of all of this should be to balance interests. The problem from there is what is the best way of assuring that this is what actually happens.

The problem with saying that the right or the interest in disclosure or the first amendment interest in each specific instance has to be overcome by showing that the disclosure did harm, for example, it seems to me, is to put a burden on the nondisclosure side that tips the balance too far in the direction of making it easy without being subject to any penalty to disclose information that should not be disclosed.

And of course we come back to the question of how do you get a fair review of the status of classification which is what your first question really asked. Can the Government constitutionally prosecute any person, you or me, for violating the unbridled administrative discretion of the classifying body?



Where the administrative determination is that the classification is OK and is not separately reviewable or not reviewable in a court, to say that the court should be able to review it, as I mentioned earlier, raises these questions of the ability of the court to arrive at a wise judgment.

If you rely on the review process within the executive branch you may have a better chance of getting a wise answer to the question of the propriety of classification.

You, on the other hand, do open up the objection that the executive branch is in effect protecting its own processes in its own interest and does not sufficiently value the right of disclosure.

And I think personally that this is the hardest problem in this general area that we have been discussing. To me, to date, this is the hardest one I understand and I am aware of, and I would like to—I feel the need to give it further thought.

Senator MUSKIE. The difficulty is compounded by the sheer numbers: you have 18,000 persons I take it in the executive branch still classifying. Who knows really what proportion of those classifications are improper? But whatever numbers or percentages they are, I am just very reluctant to impose criminal penalties the imposition of which is related to that improper classification on such a scale.

It seems to me that it is not necessary from the point of view of the Bill of Rights that it is unwise exposure of average citizens or even any citizen to criminal penalties.

I think we have identified the problem and I hope that we have indicated by these questions the reasons for our concern with the legislation which has been proposed and our belief that that legislation must be re-shaped, and hopefully we can work together to do that.

Mr. RICHARDSON. I hope so, Mr. Chairman.

May I just add one factual point? Mr. Dixon has pointed out to me that the number of those who are authorized to classify documents top secret is about 1,500 government wide. Now both numbers may be subject to further reduction.

In any event I feel very clear that irrespective of where we come out with respect to the recodification of the criminal laws and however the question of propriety or the classification may be determined with respect to the issue of whether or not somebody should be punished for a disclosure, we should in any event in the executive branch under our own steam seek to do a more rigorous job of determining the real need for classification and assuring that downgrading does take place at regular intervals. To put it more simply, we must put on ourselves a burden of justifying such classification.

Senator MUSKIE. I would agree with that. I say I have no doubt but that that is your desire and that you work to that end and I hope that we can find an effective way to compliment and supplement your efforts with wise legislation.

Mr. RICHARDSON. Thank you very much, Mr. Chairman, I hope so, too.

Senator MUSKIE. Thank you.

The committee will now stand in recess.

[Whereupon, at 3:30 p.m., the hearing was adjourned.]

TESTIMONY OF SENATOR CHARLES H. PERCY BEFORE JOINT SESSION OF SUBCOMMITTEES OF THE GOVERNMENT OPERATIONS COMMITTEE AND THE JUDICIARY COMMITTEE OF THE U.S. SENATE, JUNE 26, 1973

Mr. Chairman, I am pleased to have this opportunity to appear at this joint session of the Government Operations and Judiciary Committees convened to hear testimony on a number of important bills regarding executive privilege and government secrecy. I am here to testify in support of S. 1106, a bill which I have introduced to amend the Federal Reports Act to avoid undue delays in the collection of information by government agencies.

Specifically, S. 1106 would place limits on the broad authority currently enjoyed by the Office of Management and Budget in reviewing the requests of government agencies for permission to elicit, through questionnaires, information from industries subject to their jurisdiction. Under present law, there is no limit to the time that OMB may take in assessing these requests; under this bill, OMB would be required to approve or deny such requests within sixty days after referral to that agency. In addition, under this bill any disapprovals by OMB would require a full explanation of the reasons why permission was denied.

Mr. Chairman, it is entirely appropriate that this joint session should consider S. 1106 along with the proposals of Senator Ervin and Senator Fulbright to curtail misuse of the doctrine of executive privilege, and the proposal of Senator Muskie, S. 1142, of which I am a co-sponsor, to amend the 1967 Freedom of Information Act to more adequately fulfill the intent of that Act by making the records of government agencies more accessible to the public. Each of these bills is designed to provide American citizens, Congress, or agencies of the Federal government with information that is necessary for the effective discharge of their responsibilities—information to which they are fully entitled. Thus, it is fitting that at the same time that we consider legislation to break down the barriers which obstruct the free flow of information to the Congress or to private citizens that we also consider remedies to the barriers to information which confront agencies in the executive branch.

Mr. Chairman, the Federal Reports Act was enacted in 1942 in the midst of a massive information-gathering effort necessitated by the rationing and price controls adopted during World War II. As a result of this information-gathering process, corporations, small businesses, and many private citizens were inundated in a torrent of forms dealing with price controls, rationing and the like. The ire of the many individuals who stood in line for hours in post offices to fill out those forms caused Congress to adopt the Federal Reports Act to help eliminate bureaucratic inefficiency and needless duplication in the information-gathering process. Therefore, the Bureau of the Budget was granted authority to review any surveys of government agencies distributed to ten or more parties in order to eliminate overlapping and needless duplication.

Unfortunately, the Bureau of the Budget, and its successor, the Office of Management and Budget, over the years have consistently ignored the legislative intent of the Act and used its authority to alter and delay the questionnaires of government agencies, often rendering them outdated and useless. Under present law, Federal agencies must receive prior OMB approval for collecting identical information from ten or more persons or business firms. OMB, lacking an independent capability to review the content of these surveys, delegates that important responsibility to sundry industry advisory committees. These committees are most frequently composed of big businesses in the field surveyed—often the very same businesses from which the information is sought. Whole questions or series of questions can be drastically altered or even totally eliminated.

This point was substantiated by Commissioner Everette MacIntyre of the Federal Trade Commission in a speech delivered at the Federal Bar Association on January 16, 1969, when he stated:

"The power of review within the Bureau of the Budget extends so far as to permit forbidding collection of all or part of the information sought. In (the) case of the traditionally used questionnaire, for example, the Bureau of the Budget may withhold clearance for its issuance altogether or it may strike certain questions—a matter entirely within its discretion."

Moreover, the survey can be delayed indefinitely until it may be completely outdated. Thus, in effect, representatives of industries from which important information is desired end up deciding what questions, if any, the government

may ask them. This seems to me to be a clear conflict of interest—an unsavory situation that Congress never intended to create.

Testimony in the hearings before the Senate Government Operations Subcommittee on Intergovernmental Relations in 1970, under the enlightened chairmanship of Senator Metcalf, indicated that unconscionable delays and other abuses have, indeed, occurred through the operation of the Federal Reports Act. According to documented testimony in those hearings, the review requirements under the Federal Reports Act constituted a major impediment blocking repeated efforts by the Federal Trade Commission to distribute a detailed questionnaire to hundreds of corporations regarding corporate mergers. Such a survey, blocked repeatedly over six years, would have allowed the FTC to anticipate and plan for what subsequently became a torrent of major corporate mergers in the period from 1964 to 1970. Instead, FTC was caught short without the data essential to studied consideration of the problem.

The most notorious example of such an obstruction by the OMB involved delay of the national industrial waste survey. This questionnaire was designed to find out the magnitude of the water pollution problem, what type of pollutants were being dumped, where they were being deposited, and by what companies throughout the country. This information was critical to the development of reasonable standards and adequate enforcement for any regulatory agency dealing with water pollution. Such a survey was recommended by a Congressional subcommittee in 1963. After some delay it was sent by the Department of the Interior to the Bureau of the Budget. It was repeatedly reviewed and deferred by the BOB, each time languishing for a period of bureaucratic delay. Revisions by the Interior Department time and again failed to satisfy the censors until Congressional pressure finally led to OMB approval. I say OMB approval because by the time the survey was finally approved, the BOB had been replaced by the successor agency. The survey was approved in 1970; it had been delayed for seven years.

Another example of how this review authority has been abused by the OMB is in the area of national gas pipeline safety. We in Congress recognized the potential threat to public safety posed by approximately 500,000 miles of underground natural gas pipelines subject to no safety standards at all—by passing the Natural Gas Pipeline Safety Act in 1967. Shortly thereafter, the Office of Pipeline Safety in the Department of Transportation proposed a questionnaire to determine such things as how much pipe there was in the ground, the depth of the pipe, and the age of the pipe. When this survey was submitted for review to OMB, the industry-dominated advisory committee objected to the survey, specifically citing questions regarding age and location of the pipelines. The advisory board—and thus the pipeline industry—claimed they did not know the full age of their own pipeline systems and thus could not respond to such questions.

Clearly, the Act had been designed to remedy exactly that situation: the companies would have been required to find out how old some of the pipeline systems were and, in so doing, determine if they posed a hazard. But through the system of prior review by OMB advisory councils, affected companies were able to dissuade the government from asking some very vital albeit potentially embarrassing questions.

In his testimony before the Metcalf subcommittee, Mr. Benny Kass, Washington Counsel of the National Consumer Law Center—National Legal Aid and Defender Association, cited yet another example of delay by what was then the BOB of an important questionnaire. He stated that a survey by the National Product Safety Commission, to be distributed to neighborhood legal services organizations to assess the inner city's experience with product safety, "was delayed by the Bureau of the Budget for too long a time, and the delay, I am afraid, dealt with problems of substance as well as procedural questions."

I, too, am afraid that under the broad jurisdiction of the Federal Reports Act, the OMB through its heavy reliance on industry advisory councils—where consumers go unrepresented—has gone far beyond its mandate to eliminate annoying duplication and inefficiency in the sending of agency questionnaires. Instead, it has undertaken to revise and eliminate portions of these surveys and thus adversely affect the quantity and quality of information that Federal agencies may have available in formulating their policies. Often this revision has been a silent one: delaying the review and final approval of these surveys until their usefulness has considerably diminished or disappeared. And these delays have



come at the ultimate expense of the public whom these agencies should serve. This legislation would be a major step in ending these abuses.

The provisions of this bill were incorporated last year in my Federal Advisory Committee bill, unanimously approved by the Senate. These provisions were knocked out, however, in conference as being nongermane to the subject matter.

At this time, I agree that separate legislation is appropriate to help eliminate the problems illustrated by the examples I have discussed this morning. By setting a sixty-day limit to the period in which OMB can consider questionnaires, and by demanding a full statement explaining any disapproval by that agency, we will be taking a major step in wiping out abuses under the Federal Reports Act.

Thomas Jefferson once wrote: "If a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be." I believe that the adoption of S. 1106 is one step which we need to take to insure that our government has the knowledge upon which our freedom ultimately rests.

[The following correspondence was subsequently received from the Department of Justice. Reports on S. 1142 from other Federal agencies and departments are reprinted below:]

DEPARTMENT OF JUSTICE,  
Washington, D.C., July 12, 1973.

HON. SAM J. ERVIN, JR.,  
*Chairman, Subcommittee on Separation of Powers,  
Committee on the Judiciary,  
U.S. Senate,  
Washington, D.C.*

HON. EDMUND S. MUSKIE,  
*Chairman, Subcommittee on Intergovernmental Relations,  
Committee on Government Operations,  
U.S. Senate,  
Washington, D.C.*

HON. EDWARD M. KENNEDY,  
*Chairman, Subcommittee on Administrative Practice and Procedure,  
Committee on the Judiciary,  
U.S. Senate,  
Washington, D.C.*

DEAR MESSRS. CHAIRMEN: In his appearance before your subcommittee on June 26, 1973, Attorney General Richardson pledged to provide you with a more detailed explanation of the Department's views on S. 1142, a bill to amend the Freedom of Information Act. This is in response to that pledge.

S. 1142 is basically designed to make the Act as clear as possible, and to make government records even more quickly and fully available than at present. We are, of course, sympathetic to those purposes and wish to reiterate the Department's firm commitment to ensuring the vitality of the public's "right to know" to the greatest extent consistent with sound government. However, as the Attorney General explained, albeit in a larger context: "Secrecy is . . . a paradox. It is a threat as well as a necessary incident to democratic government." The Freedom of Information Act is directed to balancing these competing principles by providing that disclosure of government records is to be the general rule, yielding only to such compelling considerations as those provided for in the Act's exemptions. As enacted, the Act imposes an affirmative obligation on the Executive branch not to withhold access to government information unless it is specifically exempted by the Act and its release would not be in the public interest.

Based upon our broad experience in this area, it is our view that the principle solution to the problem of providing more public access to government documents and information lies not so much in revising the language of the Act, as in improving administrative compliance with its present provisions.

To this end, the Attorney General stated before your subcommittees that the Department is considering several ways to ensure greater compliance, including conducting training seminars and publishing freedom of information manuals or newsletters. In addition, he announced that four steps would be taken now to encourage better administration of the Act. These steps include: (1) a request to the Civil Service Commission to include freedom of information material in its training programs; (2) an interagency symposium to be con-

ducted by the Department before the end of the year on the Freedom of Information Act in which ideas on how to improve administration will be discussed; (3) establishment of a task force to study how the Executive Branch can better organize itself to administer the Act; and (4) a reminder to the various federal agencies of their responsibility to consult with the Department's Freedom of Information Committee before issuing final denials of requests under the Act and an order to the Department's litigating divisions not to defend a law suit unless this procedure has been followed. Taken together, these measures represent a concerted effort to ensure that no more information is withheld than is absolutely essential.

In view of the recent development of these proposals to increase compliance with the Act, we believe it would be reasonable to delay extensive amendment of the Act until these programs can be implemented and their results evaluated.

Apart from these general observations on the need and utility of amending the present Act, the Department has the following comments and recommendations concerning the provisions of the bill.

1. Section 1(a) of S. 1142 would amend the indexing provisions in subsection (a)(2) of the Act. This provision now requires every agency to maintain and make available for public inspection and copying indexes of those documents having precedential significance. The proposed amendment would go further and compel all agencies to publish and distribute such indexes.

While the theory of this amendment is salutary, in practice and as a government-wide requirement it would be expensive and essentially unnecessary.

Under the existing indexing scheme, persons who ask to use the indexes are permitted to do so. However, a large segment of the public may never have the interest or the need to use them. Thus, the considerable expense of preparing for publication, publishing, and keeping current indexes that are not oriented to a demonstrated public need would be unjustified. Even where an index does meet a need, such as a card catalogue in a library, it does not appear that the expense of publishing would be warranted.

In these cases, it is generally more practical, economical, and satisfactory to the outside person seeking information to give him direct personal assistance that fits his existing knowledge and information, rather than referring him to some index which may be largely incomprehensible because it was compiled by specialists for their own use, or to tell him to buy a published index. Moreover, a large enterprise has developed among private concerns in publishing agency materials and compiling their own indexes. For example, Congressional Clearing House and Prentice-Hall publish fully indexed tax services. To require the government to index and publish the same material would be an inefficient and expensive duplication of function.

We recommend that this amendment not be adopted until all affected agencies have had an opportunity to determine its probable impact on their staffs and budgets in relation to estimated public benefits, or until possible alternative devices which may be more effective, simpler to use, more easily kept up-to-date and less costly have been considered.

2. Section 1(b) of the bill would amend Subsection a(3) of the Act so that requests for records would no longer have to be "for identifiable records," requiring instead that a request for records "reasonably describes such records." We view this change to be essentially a matter of semantics and thus unnecessary. The Senate Report in explaining the use of the term "identifiable" in the present Act, stated: "records must be identifiable by the person requesting them, i.e., a reasonable description enabling the Government employee to locate the requested records."

Because it does alter the wording of the statute, this amendment might lead to confusion as well as to unwarranted withholding of requested records. An unsympathetic official might reject a request which would have to be processed today, on the new ground that the request is not reasonably descriptive. Also, this amendment could subject agencies to severe harassment, as where a requester adequately described the Patent Office records he sought, but his request was for about 5 million records scattered through over 3 millions files. A court, presumably unable to accept anything so unreasonable, held that the requests was not for "identifiable records." *Irons v. Schuyler*, 465 F.2d 608 (D.C. Cir. 1972). Accordingly, we conclude that this change would not be desirable at this time.

3. Section 1(c) of the bill would amend the Act by imposing time limits of 10 working days for an agency to determine whether to comply with any request and 20 working days to decide an appeal from any denial. The purpose of imposing these deadlines is to expedite agency action on requests for information. The time limits are absolute and no extensions are permitted. As the Attorney General explained in his testimony before your subcommittees, agencies should respond to such requests as expeditiously as possible, however this amendment is far too rigid for permanent and government wide application and is likely to be counter-productive to the ultimate purpose of optimizing disclosure by discouraging the careful and sympathetic processing of requests.

4. Section 1(d) of S. 1142 would impose an automatic requirement in any suit under the Act for an *in camera* inspection by the court, and if the records were withheld under the 1st exemption the court would further be directed to decide whether disclosure would injure foreign relations or national defense. These provisions, and the Department's opposition to them were discussed at length by the Attorney General in his testimony.

5. Section 1(e) would reduce the present 60-day period which the Government normally has to answer complaints against it in federal court to 20 days for all suits under the Act. It would also provide for an award of attorneys fees to the plaintiff in any such suit in which the government "has not prevailed," leaving it unclear what might happen in cases where the government prevails on part of the records in issue but does not prevail on the rest.

We oppose both features of this section. When a suit is filed under the Act, the local U.S. Attorney ordinarily consults the Department of Justice. The Department in turn must consult the agencies whose records are involved, and frequently that agency must coordinate internally among its headquarters components or its field offices, and sometimes externally with other agencies. Because the federal government is larger and more complex, and bears more crucial public interest responsibilities than any other litigant, it needs more time to develop and evaluate its positions, especially if they may affect agencies other than the one sued. A 20-day rule would require that decisions be made without ample time for comprehensive study and consequently the incidence of positions that would later be reformulated would increase, causing unnecessary work for both parties and the courts.

Furthermore, in a type of litigation which can be initiated by anyone without the customary legal requirements of standing or interest or injury, the award of attorneys fees is particularly inappropriate. It is difficult to understand why there would be departure in this area of law from the traditional rule, applied in virtually every other field of Government litigation, that attorneys fees may not be recovered against the Government.

Plaintiffs involved in Information Act cases often have less financial need for these proposed awards than in other types of litigation, because under the Act the burden of proof is upon the defendant, and because the expense of an evidentiary trial with oral testimony is rarely encountered. Moreover, although the Act has been used successfully by public interest groups to vindicate the public's right to know, not all litigants fit that category. Instead, the plaintiff may well be a businessman using the Act to gain information about a competitor's plans or operations. Or he may be someone seeking a list of names for a commercial mailing list venture. In all such cases, the obvious end result if attorneys fees were awarded would be that the taxpayers would pay for litigating both sides of the dispute.

6. Section 2(a) of S. 1142 would amend the second exemption to restrict it solely to internal personnel matters and exclude any other internal operating matters. The House Report which preceded enactment of the Act expressly construed this exemption to cover certain operating instructions, the disclosure of which might cripple effectiveness in agency operations.

We believe that analysis is still valid today for the reasons advanced by the Attorney General in his appearance before your subcommittees. If laws are to be fairly and diligently enforced and Congressional programs effectively implemented, agencies must be able to give instructions and guidance to their own staffs without exposing these instructions, routinely and under compulsion of law, to the very persons whom the agencies must investigate, audit, regulate, inspect, or negotiate with. The moment such operations become predictable, their usefulness is destroyed. Accordingly, we believe an amendment of exemption 2 which would expressly protect such operating rules used for purposes similar to those described above would be desirable.



7. Section 2(b) of this bill would amend the fourth exemption. This exemption is designed to assure the confidentiality of information submitted to the government by private persons, usually businessmen, who would otherwise refuse to furnish such information voluntarily or customarily release it to the public. The proposed amendment would limit this protection to business-type confidential information.

As the Attorney General stated the Department opposes an amendment which would place confidential information of the type likely to be furnished by businessmen in a favored class as compared to information furnished confidentially by other citizens which also deserves protection.

8. Section 2(c) would amend the sixth exemption. As now written, this provision exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The amendment would change the word "files" to read "records." It appears this change is predicated upon the assumption that agencies may place in "files" documents or records which should not be in those fields and which the public should have a right to know about. Although we are not aware of any incident in which this has actually happened, we agree that the existing exemption should be interpreted along the lines of the proposed amendment and that records which would not otherwise be exempt should not be withheld merely because they are contained in a personal file.

9. Section 2(d) of the bill would amend the seventh exemption, which covers investigatory records which are also used as a basis for public policy statements. The word "files" would be changed to "records," the phrase "law enforcement purposes" would be changed to "any specific law enforcement purpose the disclosure of which is not in the public interest," and the exemption's coverage would be restricted to exclude (i) records of scientific tests, (ii) inspection records relating to health, safety or environmental protection, and (iii) any investigatory records which are also used as a basis for public policy statements or rulemaking.

In his statement, the Attorney General described how these changes would seriously impair our ability to enforce the laws. He also noted that the Administrative Law Section of the American Bar Association opposed these changes in the seventh exemption on similar grounds and had recommended an alternative approach which would set forth explicitly the objectives which the investigatory files exemption is intended to achieve in order to assure that information is withheld only if one of those objections would be frustrated were the information disclosed. Under their proposal only material contained in an investigatory file compiled for law enforcement purposes which would disclose informants or investigative techniques, interfere with enforcement proceedings, or deprive a person of the right to a fair trial could be withheld.

Although not agreeing that exemption 7 should be amended, the Attorney General suggested that, if a fresh approach is needed, a modified version of the ABA's proposal be considered. This suggestion provides that information contained in an investigatory file pertaining to a pending or contemplated law enforcement proceeding or investigation is exempt in its entirety from disclosure. All other files are publicly available except to the extent that the production would impair a person's right to a fair trial, disclose informants, investigative techniques or jeopardize law enforcement personnel, their families or assignments, or damage the reputation of innocent persons. As such, this approach serves a dual purpose. It protects the law enforcement efficiency of this and other Departments as well as the privacy or confidentiality of any individual mentioned in such files, and, at the same time, permits public access to much of the material contained in these files.

The approach, however, was not intended to encompass FBI files or those of similar agencies whose primary responsibility is to investigate criminal activities. According to the legislative history of the Act, the seventh exemption was not to affect the FBI's investigative files at all. Therefore, this proposal was directed to those agencies and divisions of the government which perform investigative activities merely as an incident to their other statutorily imposed functions. For example, the Agriculture Department is charged with the responsibility of regulating and inspecting meat processors to ensure wholesome products. Part of that obligation includes the power to investigate and recommend the filing of criminal charges for noncompliance with inspection standards. Investigatory files compiled by Agriculture in this connection would

thus be made available for public inspection under this approach subject only to the deletion categories and providing no enforcement action was pending.

Because, however, there may be some misunderstanding as to which agency files are available under the proposal suggested by the Attorney General above and because there is a legitimate public interest in obtaining information of an historical interest, we propose that the following language be added to it. Immediately after the words "Provided, That" we suggest the insertion of the clause "with respect to files compiled by noncriminal law enforcement agencies or files compiled by criminal law enforcement agencies that are more than ———years old."<sup>1</sup> The proposal would then read as follows:

"The provisions of this section shall not be applicable to matters that are . . . (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency; *Provided, That* with respect to files compiled by noncriminal law enforcement agencies, or files compiled by criminal law enforcement agencies that are more than ———years old, this exemption shall be invoked only while a law enforcement proceeding or investigation to which such files pertain is pending or contemplated, or to the extent that the production of such files would (A) interfere with law enforcement functions designed directly to protect individuals against violations of law, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) disclose the identity of an informant, (D) disclose investigatory techniques and procedures, (E) damage the reputation of innocent persons, or (F) jeopardize law enforcement personnel or their families or assignments."

By addition of this language, public access to investigatory files is further liberalized and the distinction between the availability of public access to the files of noncriminal law enforcement agencies and criminal law enforcement agencies, such as the FBI, is made clear. Under this approach the public is given public access to all the investigatory files of non-criminal law enforcement agencies once there is no longer pending or contemplated a law enforcement proceeding or investigation. Of course, the material contained in these files is subject to deletion if it fits within one of the enumerated deletion categories or if it concerns a matter which is exempt under one or more of the other exemptions of the Act. On the other hand, all information contained in an FBI or similar agency file which is within the statutory period is exempt from compulsory disclosure regardless of whether or not an enforcement proceeding or investigation is pending or contemplated. Such files that are not within the statutory period and which are "closed" are not exempt. Names of informants defamatory material affecting innocent persons, etc. would still be subject to deletion however. This approach therefore permits the public, especially historical researchers, to gain some access to even criminal law enforcement agencies' records.

In sum, although we do not believe that an amendment of exemption 7 is needed at this time, we believe, if it is decided to amend it, that the proposal outlined above represents a reasonable compromise between the interests of the public's right to know and the protection of the integrity of the law enforcement process.

10. Section 3 of the bill would require every agency in the Executive branch to furnish any information or records in its possession to Congress upon request. In our opinion, this provision involves a direct attack on the separation of powers system established by the Constitution, and is therefore unconstitutional.

11. Section 4 of S. 1142 would require each agency to submit an annual report to Congress containing a statistical evaluation of the duties executed in administering the Act. Congress certainly has an interest and responsibility to keep informed on how the Act is being administered. Accordingly, we support the general objectives of this amendment. Nevertheless, we do not believe that legislation is necessary to accomplish this end. In the past, agencies have appeared before committees of both houses of Congress on numerous occasions and discussed their administrative operations. Statements, complete with sta-

<sup>1</sup> The Department does not express a judgment as to a specific time limit for general access to "closed" investigatory files that would accommodate vital law enforcement interests. By order dated July 11, 1973 the Attorney General instituted an experimental program granting historical researchers limited access to files of particular historic interest that have been "closed" 15 years or more. The program is as yet untested. Further experience may indicate whether this time period is sufficiently long enough to protect the legitimate concerns of law enforcement agencies.

tistical information, have been submitted on those occasions for congressional review. Similar information as that proposed to be included in the annual reports was obtained by the House Committee on Government Operations in 1971 by means of a questionnaire. These methods have the obvious advantage of flexibility and enable Congress to receive the information it needs without being locked into fixed system of reporting requirements. For this reason, this provision seems undesirable.

In view of the foregoing, the Department of Justice recommends against the enactment of this legislation in its present form.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Cordially,

MIKE McKEVITT.

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OFFICE OF THE ATTORNEY GENERAL.  
Washington, D.C., July 9, 1973.

HON. ROBERT E. HAMPTON  
*Chairman, U.S. Civil Service Commission,*  
*Washington, D.C.*

DEAR MR. CHAIRMAN: The purpose of this letter is to request your assistance in the two respects noted below on a matter of government-wide importance, meeting the need for improved administration of the Freedom of Information Act.

On June 26, 1973 I testified before three Senate subcommittees holding joint hearings on various bills pertaining to the general subject of government secrecy. A major portion of my testimony was directed toward S. 1142, a bill to amend the Freedom of Information Act. A companion House bill, H.R. 5425, had been the subject of hearings on May 8th, at which we were asked to testify on behalf of the Administration and opposed most of the proposed amendments.

During my June 26th testimony, while reiterating our opposition to most of the proposed amendments, I gave major emphasis to our determination to act on the problems of inadequate disclosure which stimulate such proposals, stating that "the real need is not to revise the Act extensively but to improve compliance." After summarizing some of the causes of less-than-ideal compliance and some of the means we are considering to upgrade it, I announced four steps which the Justice Department will take immediately, as follows:

"First, we will request the Civil Service Commission to include Freedom of Information material in its executive training and legal training programs and to assist us in arranging for inclusion of similar material in other programs for training government personnel.

"Second, we will conduct an interagency symposium on the Freedom of Information Act before the end of this year, to emphasize the need for improved administration and to provide the wider sharing of problems and ideas. This symposium will involve two-way communications as well as direct presentations, and we plan to invite the participation of Congressional and private speakers.

"Third, we will promptly institute discussions with the Administrative Conference of the United States, the Civil Service Commission, the Office of Management and Budget, and perhaps other agencies, seeking their assistance in launching a comprehensive study of how the Executive Branch can better organize itself to administer the Act, both within and among the agencies. This study will cover staffing, budgeting, training, and meeting the need for research in the application of the Act to major areas like government procurement, regulatory programs, law enforcement, and computerized records. It will cover the extent to which desirable improvements should be effected by legislation, executive order, or departmental orders. It will take account of inputs from outside the Executive Branch, and it is designed to point the way to sound and relatively permanent improvements, including greater speed of processing, greater uniformity, and greater disclosure. Our objective will be to have this study launched within 90 days and completed within one year, with reports to be furnished to Congress.

"Fourth, I will immediately remind all federal agencies of this Department's standing request that they consult our Freedom of Information Committee



before issuing final denials of requests under the Act. In this connection I will order our litigating divisions not to defend freedom of information law suits against the agencies unless the Committee has been consulted. And I will instruct the Committee to make every possible effort to advance the objective of the fullest responsible disclosure."<sup>1</sup>

By this letter I am inviting your assistance on steps one and two. (Steps three and four will be the subject of separate communications.) With regard to step one, a prompt but small start was made on June 29th, three days after my testimony, when Assistant Attorney General Robert G. Dixon, Jr., head of the Office of Legal Counsel, and Robert Saloschin, Chairman of our Freedom of Information Committee, discussed current problems in this field at a meeting of 30 general counsels and other agency lawyers arranged through the cooperation of Dr. Garcia and Mr. Mondello of your Commission. I understand this effort was well received. However, what seems necessary is a systematic program for training that will reach many more people in the agencies who are, or should be, involved in the administration of the Act. By copy of this letter, I am asking Mr. Dixon and Mr. Saloschin to make themselves available to discuss with you and your staff the nature of the training needs involved, and the extent to which we may be able to assist the Commission by furnishing materials or services supporting training activities. I would hope these discussions will lead to informal agreement, if practicable before the end of July, on an initial series of training activities.

As to step two (the interagency symposium), we would appreciate any assistance the Commission can offer us, particularly in the area of arrangements, to contribute to its success. No specific dates have yet been identified for this symposium, but it seems desirable that it be scheduled for some time between the middle of October and the middle of December. I would hope that cooperation with regard to this symposium could be the subject of discussion between our agencies at, or shortly after, the discussions on step one, above.

The Justice Department looks forward to the opportunity of working with the Civil Service Commission in these important matters. I am sending copies of this letter to Senators Muskie, Kennedy and Ervin, and to Congressman Moorhead for their information in view of their deep interest in this subject.

Sincerely,

ELLIOT L. RICHARDSON,  
*Attorney General.*

Enclosure

<sup>1</sup> To indicate the context in which these four steps were announced, there is enclosed a copy of my prepared testimony of June 26th, with the four steps set forth at pp. 6-8.

## TEXT OF FREEDOM OF INFORMATION ACT

Public Law 90-23; H.R. 5357, 90th Cong., June 5, 1967

AN ACT To amend section 552 of title 5, United States Code, to codify the provisions of Public Law 89-487

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 552 of title 5, United States Code, is amended to read:

### "§ 552. Public information; agency rules, opinions, orders, records, and proceedings

"(a) Each agency shall make available to the public information as follows:

"(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

"(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

"(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available:

"(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

"(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

"(E) each amendment, revision, or repeal of the foregoing. Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

"(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

"(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

"(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

"(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

"(i) it has been indexed and either made available or published as provided by this paragraph; or

"(ii) the party has actual and timely notice of the terms thereof.

"(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

"(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

"(b) This section does not apply to matters that are—

"(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

"(2) related solely to the internal personnel rules and practices of an agency;

"(3) specifically exempted from disclosure by statute;

"(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

"(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

"(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

"(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

"(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

"(9) geological and geophysical information and data, including maps, concerning wells.

"(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress."

SEC. 2. The analysis of chapter 5 of title 5, United States Code, is amended by striking out:

"552. Publication of information, rules, opinions, orders, and public records."

and inserting in place thereof:

"552. Public information; agency rules, opinions, orders, records, and proceedings."

SEC. 3. The Act of July 4, 1966 (Public Law 89-487, 80 Stat. 250), is repealed.

SEC. 4. This Act shall be effective July 4, 1967, or on the date of enactment, whichever is later.



## TEXT OF S. 1142

S. 1142, 93D CONG. 1st sess.

A BILL To amend section 552 of title 5, United States Code, known as the Freedom of Information Act

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

SECTION 1. (a) The fourth sentence of section 552(a)(2) of title 5, United States Code, is amended by striking out "and make available for public inspection and copying" and inserting in lieu thereof ", promptly publish, and distribute (by sale or otherwise) copies of".

(b) Section 552(a)(3) of title 5, United States Code, is amended by striking out "on request for identifiable records made in accordance with published rules stating the time, place, fees, to the extent authorized by statute, and procedure to be followed," and inserting in lieu thereof the following: "upon any request for records which (A) reasonably describes such records, and (B) is made in accordance with published rules stating the time, place, fees, to the extent authorized by statute, and procedures to be followed,".

(C) Section 552(a) of title 5, United States Code, is amended by adding at the end thereof the following new paragraph:

"(5) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

"(A) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor;

"(B) in the case of a determination not to comply with any such request, immediately notify the person making such request that such person has a period of twenty days (excepting Saturdays, Sundays, and legal public holidays), beginning on the date of receipt of such notification, within which to appeal such determination to such agency; and

"(C) make a determination with respect to such appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays, after the receipt of such appeal.

Any person making a request to an agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with subparagraph (A) or subparagraph (C) of this paragraph. Upon any determination by an agency to comply with a request for records, such records shall be made available as soon as practicable to such person making such request."

(d) (1) The third sentence of section 552(a)(3) of title 5, United States Code, is amended by inserting immediately after "the court shall determine the matter de novo" the following: "including by examination of the contents of any agency records in camera to determine if such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) and the burden is on the agency to sustain its action."

(2) Section 552(a)(3) of title 5, United States Code, is amended by inserting the following new sentence immediately after the third sentence thereof: "In the case of any agency records which the agency claims are within the purview of subsection (b)(1), such in camera investigation by the court shall be of the contents of such records in order to determine if such records, or any part thereof, cannot be disclosed because such disclosure would be harmful to the national defense or foreign policy of the United States."

(e) Section 552(a)(3) of title 5, United States Code, is amended by adding at the end thereof the following new sentence: "Notwithstanding any other provision of law, the United States or an officer or agency thereof shall serve an

answer to any complaint made under this paragraph within twenty days after the service upon the United States attorney of the pleading in which such complaint is made. The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the United States or an officer or agency thereof, as litigant, has not prevailed."

"SEC. 2. (a) Section 552(b)(2) of title 5, United States Code, is amended by inserting "internal personnel" immediately before "practices", and by inserting "and the disclosure of which would unduly impede the functioning of such agency" immediately before the semicolon at the end thereof.

(b) Section 552(b)(4) of title 5, United States Code, is amended by inserting "obtained from a person which are privileged or confidential" immediately after "trade secrets", and by striking out "and" the second time that it appears therein and by inserting in lieu thereof "which is".

(c) Section 552(b)(6) of title 5, United States Code, is amended by striking out "files" both times that it appears therein and inserting in lieu thereof "records".

(d) Section 552(b)(7) of title 5, United States Code, is amended to read as follows:

"(7) investigatory records compiled for any specific law-enforcement purpose the disclosure of which is not in the public interest, except to the extent that—

"(A) any such investigatory records are available by law to a party other than an agency, or

"(B) any such investigatory records are—

"(i) scientific tests, reports, or data.

"(ii) inspection reports of any agency which relate to health, safety, environmental protection, or

"(iii) records which serve as a basis for any public policy statement made by any agency or officer or employee or the United States or which serve as a basis for rulemaking by any agency;"

SEC. 3. Section 552(c) of title 5, United States Code, is amended to read as follows:

"(c)(1) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section.

"(2)(A) Notwithstanding subsection (2), any agency shall furnish any information or records to Congress or any committee of Congress promptly upon written request to the head of such agency by the Speaker of the House of Representatives, the President of the Senate, or the chairman of any such committee, as the case may be.

"(B) For purposes of this paragraph, the term 'committee of Congress' means any committee of the Senate or House of Representatives or any subcommittee of any such committee or any joint committee of Congress or any subcommittee of any such joint committee."

SEC. 4. Section 552 of title 5, United States Code, is amended by adding at the end thereof the following new subsection:

"(d) Each agency shall, on or before March 1 of each calendar year, submit a report to the Committee on Government Operations of the House of Representatives and the Committee on Government Operations of the Senate which shall include—

"(1) the number of requests for records made to such agency under subsection (a);

"(2) the number of determinations made by such agency not to comply with any such request, and the reasons for each such determination;

"(3) the number of appeals made by persons under subsection (a)(5)(B);

"(4) the number of days taken by such agency to make any determination regarding any request for records and regarding any appeal;

"(5) the number of complaints made under subsection (a)(3);

"(6) a copy of any rule made by such agency regarding this section; and

"(7) such other information as will indicate efforts to administer fully this section; during the preceding calendar year."

SEC. 5. The amendments made by this Act shall take effect on the ninetieth day after the date of enactment of this Act.

## AGENCY REPORTS ON S. 1142

DEPARTMENT OF STATE,  
Washington, D.C., June 6, 1973.

HON. JAMES O. EASTLAND,  
*Chairman, Committee on the Judiciary,*  
*U.S. Senate.*

DEAR MR. CHAIRMAN: The Secretary has asked me to reply to your letter of April 13, 1973, requesting a report by the Department of State on S. 1142, a bill "To amend section 552 of title 5, United States Code, known as the Freedom of Information Act".

Section 1(a) of the bill would amend 5 U.S.C. 552(a)(2) to require the publication and distribution of a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by 5 U.S.C. 552(a)(2) to be made available or published. The Department of State has a relatively low volume of material so required to be made available or published, and consequently indexed. Therefore, it would defer to other agencies with large volumes of such material as to the feasibility of requiring publication of a current index.

Section 1(b) of the bill would amend 5 U.S.C. 552(a)(3) to revise the present requirements governing a request for records to require that the request only "reasonably describe" the records, rather than be a request for "identifiable records". The Department of State believes that under its existing procedures, any request which reasonably describes records sought is considered to be a request for identifiable records, and has no objection to this revision but sees no need for it.

Section 1(c) of the bill would amend 5 U.S.C. 552(a) further by adding a new paragraph which requires the agency receiving a request for records to decide within ten working days whether to comply with the request and to immediately notify the requester of its decision and the reasons. The new paragraph would also require the agency which decides not to comply to immediately notify the requester that he has twenty working days from receipt of the notice to appeal the decision within the agency and require the agency to decide on any appeal within twenty working days from receipt of the appeal. The new paragraph also provides that failure of the agency to meet the time limits either for initial decision or decision on appeal shall be considered as exhaustion of administrative remedies by the person requesting records. The Department of State believes that it is important to have speedy decisions on requests for documents, but experience, especially recent experience, shows that many requests are for such voluminous records—numbering in the hundreds or even thousands of pages—that meaningful review for purposes of decision within any specific time period is not physically possible. The Department would therefore oppose this provision of S. 1142 as unworkable.

Section 1(d) of the bill would amend 5 U.S.C. 552(a)(3), relating to judicial review, to provide for the reviewing court to examine the contents of agency records in camera to determine if the records or any part of them shall be withheld under exemptions in 5 U.S.C. 552(b) and specifically would direct such a review for cases under 5 U.S.C. 552(b)(1) relating to classified information. The Department of State believes that court review in camera in the area of records bearing a security classification is inappropriate. Courts have traditionally refrained from reviewing the conduct of foreign affairs as something peculiarly within the responsibility and competence of the Executive. Under Executive Order 11652, security classification depends upon whether disclosure could reasonably be expected to cause exceptionally grave damage to the national security (Top Secret), could reasonably be expected to cause serious damage to the national security (Secret), or could reasonably be expected to cause damage to national security (Confidential). The examples given in section 1(A), (B), and (C) of Executive Order 11652, however, illustrate the kind of foreign policy



judgments that may be involved, and this provision of S. 1142, if enacted, would place courts in the position of reviewing substantive foreign policy judgments. This we believe would be a serious problem. We accept the decision of the Supreme Court in *Environmental Protection Agency, et al v. Mink, et al* (January 22, 1973) that in camera inspection may be appropriate for the application of some exemptions but not for information classified pursuant to Executive Order.

Section 1(a) of S. 1142 also amends 5 U.S.C. 552(a) (3) to require the United States to answer any complaint to a court for review of non-disclosure within twenty days after service upon the United States attorney and for assessment of costs against the United States in cases where non-disclosure is not upheld. The Department defers to the Department of Justice on this provision, but notes the point made earlier about the impossibility of adequately reviewing requests for large numbers of records within a period of ten days for initial decision and twenty days on appeal.

Section 2(a) of S. 1142 would amend 5 U.S.C. 552(b) (2) to exempt from disclosure only those internal personnel rules and practices of an agency the disclosure of which would unduly impede the functioning of such agency. The Department of State believes that to expose its internal instructions to its negotiators and to other personnel whose activities are conducted in arms length situations would unduly impede its functioning.

Section 2(b) of the bill would amend 5 U.S.C. 552(b) (4) to provide that only trade secrets obtained from a person which are privileged and confidential may be exempt from disclosure. The Department of State sees no need for this amendment.

Section 2(c) of the bill amends 5 U.S.C. 552(b) (6) to substitute "records" for "files." The Department has no objection to this amendment in principle but believes its practical effect may tend to erode protection for individual privacy.

Section 2(d) of the bill amends 5 U.S.C. 552(b) (7), relating to investigative files, to attach several new conditions for exemption. The investigatory files of this Department would appear to be unaffected by the new conditions, and we would defer to other agencies on this amendment.

Section 3 of S. 1142 would amend 5 U.S.C. 552(c) to require the furnishing of records to the Congress notwithstanding the exemptions in 5 U.S.C. 552(b). The Department opposes this amendment because it fails to take into consideration the constitutional power of the President to withhold information from Congress and its Committees in appropriation situations including some which pertain to the responsibilities of this Department. The Department believes that the proposed amendment, therefore, raises serious constitutional questions.

Section 4 of the bill would add a new subsection (d) to 5 U.S.C. 552 which would require each agency to report annually to the Government Operations Committees of the Congress on that agency's administration of the Freedom of Information Act. The Department has no objection to such a reporting requirement.

Section 5 of the bill defers the effect of the proposed amendments for ninety days. The Department believes that this is desirable.

The Office of Management and Budget advises that from the standpoint of the Administration's program there is no objection to the submission of this report.

Sincerely yours,

MARSHALL WRIGHT,  
*Assistant Secretary for Congressional Relations.*

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THE GENERAL COUNSEL OF THE TREASURY,  
*Washington, D.C., August 3, 1973.*

HON. JAMES O. EASTLAND,  
*Chairman, Committee on the Judiciary,*  
*U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: Reference is made to your request for the views of this Department on S. 1142, "To amend section 552 of title 5, United States Code, known as the Freedom of Information Act."

Section 1 of the bill proposes to amend section 552(a) (2) which places on agencies the obligation to provide designated materials and indices thereof for public inspection and copying, and subsection (a) (3) which requires agencies

to make available identifiable records upon request, in order to add certain additional requirements; section 2 of the bill would amend the exemption provisions in section 552(b) to redefine and generally restrict these exceptions; section 3 would amend subsection (c) to elaborate the requirement for the disclosure of information or records to Congress; and section 4 of the bill would add a new subsection (d) to section 552 to require certain reports to Congress on the operations of the agencies under the Act. The views of this Department on each of the specific proposals will be discussed in order.

Section 1(a) of the bill would amend the provisions requiring agencies to maintain and make available for public inspection and copying a current index identifying the information required to be made available for the public by changing this requirement to a duty to "promptly publish, and distribute (by sale or otherwise) copies of" such index. Indices of those Treasury materials required by section 552(a) (2) to be made available to the public, which are of substantial interest to the public, are now published and made available for sale. These indices are those of the precedential rulings of the Internal Revenue Service and the Bureau of Customs, which are published in bound volumes by the Government Printing Office. However, the proposed requirement of publication of indices of all materials now made available for copying by those members of the public interested therein would demand the expenditure of time and money by the agencies not warranted by the public benefit. This is particularly true with respect to the materials originated in the bureaus and offices of this Department which are not responsible for law enforcement. These materials generally consist only of statements of policy and internal instructions. Experience has shown that there has been almost no interest by the public in these materials. If the amendment contemplates by the requirement to "publish and distribute" the publication by the Government Printing Office, or a similar formal publication by an agency authorized to undertake printing, the requirement would place a serious burden upon Government publication facilities not justified by the demand. We believe the present system of making copies of unpublished indices available upon request, at cost of photocopy, to be preferable.

Section 1(b) of the bill would amend the description of the request for records to be made available to any person under section 552(a) (3) from a request for "identifiable" records to a request which "reasonably describes such records." The basic regulations of this Department under the Freedom of Information Act presently define the term "identifiable" as "reasonably specific description of the particular records sought which will enable a Treasury employee to locate the requested record" (31 CFR 1.3(f)). Consequently, we see no need for this amendment.

Section 1(c) of the bill would impose rigid time limits for responding definitively to requests for records; namely, 10 days from date of receipt of the request for making the original determination of disclosure or nondisclosure, and 20 days after the receipt of an appeal for making the final determination. The bill proposes to enforce the rigid time table by providing that if any agency fails to comply therewith, the person making the request shall be deemed to have exhausted his administrative remedies.

The Department has recognized the importance of time limitations in the handling of requests for information and in taking action on appeals. On June 5, 1973, Secretary Shultz promulgated Administrative Circular No. 159, Revised, on Disclosure of Records under the Freedom of Information Act, which provides directives on disclosure operations. Among these are requirements for response to requests for records within 10 days and for action on appeals within 20 days, but each requirement recognizes that definitive responses cannot always be provided within these time frames. The guidelines indicate acceptable reasons for a more extended period of consideration, but provide that in such instances appropriate acknowledgements are to be made within the time limitations. These guidelines were promulgated after a thorough consideration of the time-limit question in the Department. It was the consensus of all responsible officials that the setting of time limitations, with no exception for the review of complex and extensive records, or for the meeting of other difficulties inherent in response to requests, would endanger intelligent review and action. It is our opinion that the public would be ill served by adherence without exception to a rigid time frame.

Section 1(d) would amend the judicial review provisions in section 552(a) (3) to provide that the courts may determine in camera whether the records sought to be withheld by the agency may properly be withheld under any of the exemp-

tions in section 552(b), including specifically records claimed to be exempt by reason of national security classification under exemption (b) (1). The Supreme Court held in *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973) that the Act did not intend to submit to judicial review at the instance of any inquirer the soundness of the executive's national security classifications. We believe this is the proper principle and that the Act should not be amended in this regard. Under the present (b) (1) Executive Order, No. 11652, the classification of any document classified more than 10 years must be reconsidered at the request of any person.

Section 1(e) would add a provision which would allow the United States only 20 days to answer a complaint under the Freedom of Information Act and would provide that reasonable attorneys' fees and other litigation costs may be assessed against the United States in any case under this section in which the United States or any officer or agency thereof, as litigant, has not prevailed. It is believed that the 20 day period proposed for answer by the United States is unrealistic in light of the absolute necessity of meaningful consultation between the affected agency and the Department of Justice. In the case of civil actions involving the United States as a party defendant, the Government, as a matter of practice, is normally allowed three times the period of time accorded to private party defendants (20 days) in which to respond. It is suggested that the same considerations prompting that exception are equally applicable to civil actions involving litigation under the Freedom of Information Act.

Section 2412, title 28, United States Code, prohibits the assessment against the United States of attorneys' fees unless such liability is expressly provided for by statute. The Department defers to the views of the Department of Justice on the matter of allowing the assessment of attorneys' fees against the United States when a court rules against the agency in a Freedom of Information case.

Section 2 of the bill proposes to amend several of the exemptions in section 552(b); namely, exemptions (2), (4), (6) and (7). Of these the Department has no objection to, or comment upon, the proposed amendment to exemption (6) which would substitute the word "records" for "files."

The amendment to section 552(b) (2) would confine the exemption for internal practices of any agency to "internal personnel practices of any agency and the disclosure of which would unduly impede the functioning of such agency." The restriction of the amendment to internal personnel practices apparently would, in effect, codify the interpretation given to this provision in the Senate Committee report on the legislation which became the Freedom of Information Act, as opposed to that in the House Committee report, in conformity with a recent decision in the 6th Circuit Court of Appeals. The Court's decision may not be the final conclusion on this point, but, in any case, it is one which we believe should be modified rather than codified in any amendment to this exemption. There are internal management operations which the House Committee report recognized should be withheld from public disclosure. We believe that any amendment of this exemption should allow for such withholding.

The amendment to exemption (4) would narrow its scope. The Department defers to the views of the Department of Justice on this amendment.

The amendment to exemption (7) would, first, restrict the investigatory records protected to those compiled for any "specific" law enforcement purpose. The insertion of "specific" would, if narrowly construed, be asserted as a reason to deny the exemption in a broad inquiry which had not yet been brought to focus on specific persons. Consequently, the insertion might hamper law enforcement.

Exemption (7) would also be amended to compel the disclosure of portions of investigatory files which are in the nature of scientific tests, reports or data, inspection reports relating to health, safety, and environmental protection, and records constituting the basis of public policy statements, regardless of the fact that the material would not be available to a private party in litigation and without reference to whether such disclosure would be in the public interest. The Department does not favor this proposal. The legislative purposes underpinning the investigatory exemption were (1) to prevent the premature disclosure of the results of an investigation so as not to prejudice or interfere with enforcement efforts, and (2) to keep confidential sources of information and in some cases the procedures by which the investigation was conducted and by which the Government has obtained information. The necessity of this protection is not vitiated by the fact that the materials sought are scientific tests, reports or



other records which form the basis for policy statements. We can see no basis for releasing information which if released would interfere with law enforcement.

Section 3 of the bill would amend section 552(c) by extending the present provision stating that the Act does not authorize the withholding of information from Congress. The amended provision would require an agency to furnish any information or records to Congress, or any committee of Congress, and would define a committee of Congress as including subcommittees and joint committees. We defer to the views of the Department of Justice on the constitutional issue involved in this amendment.

Section 4 of the bill would require each agency to submit an annual report to the Government Operations Committees of both Houses which would include such statistics as the number of requests for records under section 552(a), of denials and appeals, of the days consumed in taking action, and of litigation complaints. Although this Department has no objection to filing suitable reports and has reported to the House Subcommittee on Foreign Operations and Government Information much of this type of data, we see no need for statutory language to accomplish this purpose. Any statutory requirement for reports, however, should make clear the coverage intended. Technically, requests for records covered by section 552(a) (3) refers to all records not made available by the agency under section 552(a) (1) and (2). However, this Department, and probably most agencies, receive thousands of requests for information and records without any reference to the Freedom of Information Act, which are handled routinely. If the statistics to be assembled for report to Congress are to provide a meaningful disclosure of operations under the Act, the requests to be reported should be confined to those which have been submitted as Freedom of Information Act requests or which have been denied under the authority of that Act.

In view of the foregoing considerations, we do not favor the enactment of S. 1142 in the present form.

The Department has been advised by the Office of Management and Budget that there is no objection from the standpoint of the Administration's program to the submission of this report to your Committee.

Sincerely yours,

EDWARD C. SCHMULTS,  
*General Counsel.*

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GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE,  
*Washington, D.C., May 8, 1973.*

Hon. JAMES O. EASTLAND,  
*Chairman, Committee on Judiciary,*  
*U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: Reference is made to your request for the views of the Department of Defense on S. 1142, 93rd Congress, a bill "To amend section 552 of title 5, United States Code, known as the Freedom of Information Act."

The purpose of the bill is to impose on executive branch agencies additional administrative requirements that will insure the processing of Freedom of Information Act requests within fixed time periods and will clarify or limit the bases on which records may be considered exempt from disclosure under the Act. To facilitate understanding of the position of the Department of Defense on this bill, there follows a description of each proposed significant modification of section 552 of title 5, United States Code, along with the Department's specific reaction to that proposed modification.

First, the bill would amend section 552(a) (2) to require that each agency publish and distribute, by sale or otherwise, copies of a current index of any matter issued, adopted, or promulgated after July 4, 1967, which is in the nature of a final opinion in the adjudication of a case, a statement of policy or interpretation of a policy adopted by the agency and not published in the *Federal Register*, or administrative staff manuals and instructions to staff that affect the public. This publication and distribution would be in lieu of the present practice of making such indexes available for public inspection and copying.

Although the Department of Defense has no objection in principle to this change, we question whether there is sufficient interest in indexes of this kind among members of the public to justify their routine publication and distribu-

tion. Their availability under current law from inspection and copying seems more consistent with the level of public interest.

Where that level of interest is higher, agencies, of course, are not precluded from publishing and distributing such indexes as a more responsive and convenient method of insuring public access. A requirement to routinely do so, however, will impose a significant burden on the agencies that would be difficult to justify for most such indexes which are primarily of internal agency interest.

*Second*, the bill, by amending section 552(a)(3), would substitute for the requirement that requests be confined to "identifiable records" a new criterion that requesters "reasonably describe" the records they seek. Since the Department of Defense, through its implementing regulations, has interpreted "identifiable records" as those which can be located with a reasonable amount of effort, we see no need for the proposed modification which presumably has much the same effect.

*Third*, the bill would require by adding a new paragraph to section 552(a) that each agency determine within 10 working days after the receipt of the request for records whether it will comply with the request and promptly notify the requester of that determination. In addition, appeals from initial refusals to provide requested records must, by the terms of the new paragraph be made *by the requester* within 20 working days of the date of notification of the initial denial, and a final determination with respect to such an appeal must be made *by the agency* within 20 working days after the receipt of an appeal. If an agency fails to comply with the time limitations for these determinations, the requester is deemed to have exhausted his administrative remedies with respect to any such request. After a favorable determination on a request, agencies are obliged to make records available as soon as practicable.

The time limitations imposed on the agencies by these changes are totally impracticable in a large organization with multiple facilities, such as the Department of Defense. The millions of records in the custody of the Department of Defense are stored in a multitude of worldwide locations, where records requested under the Freedom of Information Act are interspersed in common files with other records. Requested records are, therefore, difficult to retrieve and evaluate for releasability, and obviously no determination can be made and conveyed to the requester pending that retrieval. The Administrative Conference of the United States, in its evaluation of administrative problems under the Freedom of Information Act, recognized this serious problem. It carefully prescribed in Recommendation No. 24 circumstances under which an agency may, within a 10-day period for an initial request, and a 20-day period for an appeal, advise the requester of reasons for delay and of the anticipated date on which a determination to release or withhold will be made.

The reasons available under Recommendation No. 24 for failure to make a substantive determination within the prescribed time limits, cover the vast majority of situations in which delay by an agency is likely or inevitable. We, therefore, recommend that the bill be modified to incorporate the more realistic and workable "Principles and Guidelines for Implementation of the Freedom of Information Act" contained in Recommendation No. 24, as they relate to the time for replying to requests for records if statutory time limitations are considered necessary. Failure to adopt such a modification would, if the bill were enacted into law, result in a serious disruption of the work of any agency which conscientiously attempts to meet the unrealistic time limitations proposed. Moreover, the net effect of unrealistic time limitations for agency processing of requests will probably be a great increase in litigation. It is unlikely, in our view, that a requester will be better served by an earlier opportunity for litigation which shifts the burden to a court for evaluation of his request than by a more reasonable time period for an agency evaluation that may well result in an administrative determination to release the requested record.

Lack of agency experience with time limitations for answering Freedom of Information Act requests, however, makes questionable any statutory requirement. Some of the reasons for excusable delay listed in Administrative Conference Recommendation No. 24 may prove to be unjustified, whereas other reasons not recognized in that Recommendation may prove compelling. We, therefore, agree with the American Bar Association position that the agencies should be given a reasonable opportunity to effect such requirements by regulations which can be modified readily to reflect the lessons of experience. Consistent with that approach, a revision of the Department of Defense Freedom of Information Di-

rective is currently being coordinated with the military departments and other components of the Department of Defense. This revision incorporates the substance of Recommendation No. 24, along with additional changes that are responsive to recommendations of this Subcommittee and others in Congress.

The proposed requirement that a requester must file an appeal from the initial denial of a record by an agency within 20 days of receipt of notice of the denial is undoubtedly intended to facilitate timely agency processing of such requests. Although we agree that appeals should be filed promptly while the issues are fresh and relevant files are readily available, it is unclear that failure by the requester to meet the time limit will prevent him from initiating an entirely new request for the same record which an agency would be required to reprocess. In other words, we doubt the effectiveness of the proposed language as a realistic limitation on requesters. If the intent is to bar a requester from making any further efforts to secure a denied record when he has failed to appeal the denial within 20 days, a provision to this effect should be added to the bill. The Department of Defense, however, does not favor such a restriction on citizens, as it could prove particularly troublesome to those without the resources to hire legal counsel.

*Fourth*, the bill, by amending the third sentence of section 552(a)(3), would expressly incorporate a requirement that courts in hearing complaints to force the release of agency records, examine the contents of the withheld records in camera to determine whether an agency has sustained its burden of demonstrating that the record falls within one of the exemptions of the Freedom of Information Act. More specifically, it would also add a requirement that any record withheld under 5 U.S.C. 552(b)(1) in the interest of national defense or foreign policy of the United States, be investigated in camera by the court for the purpose of determining whether it properly falls within the criteria of that exemption.

The Department of Defense opposes this proposal to prescribe the methods by which the courts can evaluate an agency's determination that a requested record comes within one of the express exemptions of the Act. If the judge is satisfied by affidavits, depositions, or testimony, that a requested record is exempt, he should not be required to examine that record in camera. Such a procedure has been described by at least one Federal District Court judge (Gerhard A. Gessell) as "entirely foreign to our traditions," because the papers placed in the hands of the judge for his private *ex parte* inspection are excluded from the eyes of the litigants (*Moss v. Laird*, D.D.C., Civil Action No. 1254-71, Dec. 7, 1971). Moreover, there is considerable doubt that the experience and background of a judge is adequate to evaluate the impact of a record on the national defense or foreign policy of the United States, even if he is given detailed *ex parte* background briefings closed to those seeking the record. Responsibility for protection of executive branch records is a Presidential responsibility. Executive Order 11652 has carefully set forth the bases for security classification of documents for the protection of records from public disclosure when their revelation would be contrary to the interest of the national defense or foreign relations of the United States. The terms of this Executive Order must be carefully complied with by each agency, so that the proper role of the courts is to insure, as indicated in *Environmental Protection Agency v. Mink* (93 S. Ct. 827 (1973)), that the document has been designated for such protection in accordance with the provisions of that Executive Order.

In other kinds of litigation, the courts have long recognized the right of agency heads to decline to produce classified or other privileged information sought through the discovery process when its continued protection is deemed essential by the head of the agency. His determination is evidenced by the filing of a suitable affidavit (see *Reynolds v. United States*, 345 U.S. 1 (1953)). In our view, this is the proper posture for the courts to assume and is generally consistent with operating responsibilities of the Department of Defense.

*Fifth*, the bill would require the United States to file an answer to any complaint filed under the Freedom of Information Act within 20 days after service upon the United States Attorney of the pleading in which such complaint is made. Apparently, the intent is to require the answer to be filed within 20 calendar days since no exclusion of Saturdays, Sundays, and holidays (as expressly provided in other sections of the bill dealing with time limitations), is mentioned in this section. In addition, reasonable attorney fees and other litigation costs may be charged against the United States by the court in any case in which the requester prevails in his effort to obtain release of a record.



The Department of Defense strongly opposes the proposed requirement for filing an answer within 20 days of the receipt of the complaint. Such a time limitation is totally impracticable in a large department where such suits may be filed anywhere in the United States and where delivery time for mail and other inevitable administrative processing often will prevent knowledgeable, responsible officials within this department from even being aware that the suit has been filed before the passage of 20 calendar days. Moreover, even in those cases in which an answer can be filed with the court within the time limit, this will mean a higher priority for all Freedom of Information cases than for any other type of case. We do not believe that there is justification for discriminatorily favorable treatment for every Freedom of Information case. Such priority attention for these cases will severely disrupt the orderly administrative processing of other litigation that may be more significant to the public, the Congress, or the Department of Defense.

Under the current provisions of section 552(a)(3) courts have authority to give precedence on the docket over all other cases to those Freedom of Information Act requests which merit such favored consideration. Hearing and trial of such cases is authorized at the earliest practicable date and they are to be expedited in every way, except as to causes of action the court considers of greater importance. This appears to offer all of the authority necessary for prompt judicial attention to Freedom of Information litigation that merits such treatment, and has the great advantage of flexibility that permits the exercise of judgment by the court on difficult issues of relative priorities.

Moreover, the requirement in the bill that the answer be filed within 20 days of the receipt of the complaint does not insure any more expeditious hearing and trial than is authorized under current law. It simply makes unlikely sufficient opportunity for the preparation of a careful and thoroughly considered answer. Thus, more of the burden falls on the court to develop and evaluate all of the information and arguments that should properly be considered in agency evaluation of the issues raised.

Authority in the court to assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in Freedom of Information cases in which the requester prevails is objectionable to the extent it promotes unnecessary litigation. The already overburdened court system should not be further hampered by Freedom of Information cases brought by citizens encouraged to gamble on litigation with the hope that its cost will be assessed against the United States. The discipline of paying these costs which prevails under the current practice tends to insure that only requesters with a substantial public or private interest will initiate litigation. The proliferation of public interest law firms and other sources of legal assistance to private citizens without private resources necessary to bring litigation has gone a long way toward guaranteeing a "day in court" to those with legitimate disagreements with the agencies on Freedom of Information Act interpretations relative to documents of general public interest.

Moreover, it has been clearly demonstrated that almost all litigants under the Freedom of Information Act seek the records for purposes of private exploitation which frequently is profitable. On the other hand, agency resistance to production of records is sometimes pursuant to a supposed legal obligation to protect private interests under an express or implied understanding with the agency. Trade secrets come to mind as an obvious example. In such cases, no broad public interest in the records is likely to exist. Consequently, the expenditure of public funds to secure release of the records through court action would be difficult to justify, even though the agency misinterpreted its obligation under the law. Therefore, we would hope that if such an amendment is adopted, that the legislative history emphasize a Congressional desire that the courts not exercise their discretionary authority to award costs to the successful complainant in this kind of case.

*Sixth*, Section 2 of the bill contains several substantive modifications of subsection (b) of section 552, title 5, United States Code, which sets forth the exceptions to the general requirement for the public availability of all agency records. The first of these proposed modifications would limit subsection 552 (b)(2) to records relating solely to the "internal personnel practices" of an agency and thereby presumably exclude from the exemption records concerning other internal practices. The Department of Defense objects to this because there are certain "internal practices" not involving personnel that should be exempted from the public disclosure requirement.

Internal practices include practices such as the techniques for auditing Government contracts contained in a document known as the *Defense Contract Audit Manual*. The sole function of this Manual is to furnish guidance to Defense Contract Audit Agency auditors on how to conduct effective audits of Government contractors' records. While the Manual is thus related solely to the Defense Contract Audit Agency's "internal personnel rules and practices" for carrying out their auditing functions, it could not be properly described as a record relating solely to "internal personnel practices" under the proposed amendment. Yet, its disclosure would seriously harm and unduly impede the Defense Contract Audit Agency's functioning in the interests of the taxpayer. Similarly, various publications concerning negotiating and bargaining techniques, bargaining limitations and positions, or inspection schedules and methods, may not qualify as records "related solely to the internal personnel practices" of the Department of Defense. Nevertheless, their continued protection from public disclosure is essential in many cases to fulfilling the agency's responsibilities for the public's business.

We believe that the proposed limitation on the use of this exemption to those records "the disclosure of which would unduly impede the functioning of such agency" would be sufficient to protect against any abuse of an exemption to protect both "internal personnel rules and other internal practices." There is no need for such language however, since the courts in fact apply such a factor in this type of case. If, therefore, any change is made in 5 U.S.C. 552(b) (2) it should be one to clarify the right of agencies to protect records "related solely to the internal practices" that are followed to insure the proper functioning of the agency.

*Seventh*, the proposed modification of subsection (b) (4), section 552, appears to be editorial and accurately reflects the interpretation which the Department of Defense has made of this exemption insofar as it applies to commercial, financial, and trade secret records. We believe, however, that the exemption, as presently worded, and particularly as it would be worded under the proposed modification, does not constitute authority to fulfill the expressed congressional intent of permitting all citizens to communicate with their government in confidence. The legislative history of P.L. 89-487 supports the view that Congress intended to include within this exemption the traditional evidentiary privileges such as priest-penitent, doctor-patient, lawyer-client, etc., and to permit a citizen to provide directly to federal agencies information in confidence about any matter of legitimate official concern. The use of the terms "trade secrets" and "commercial or financial information" implies a limitation on the kinds of subjects which are guaranteed this confidentiality. It would for example, be difficult to imagine circumstances in which the doctor-patient privileges would fall within the normal interpretation of those terms.

Similarly, there is information which will be conveyed to the agency only in confidence, even by its own employees. Some agency operations, accident investigations, and other matters of proper concern to the agency, not necessarily involving "commercial or financial information" or "trade secrets," may benefit from confidential communication from private citizens or employees. Much of this information, however, is probably not protectible as part of a law enforcement investigation record. Yet, few would argue that such communications should be discouraged by the inability to assure confidentiality. Consequently, we recommend that the exemption be expanded by the addition of a phrase "and other information received by the agency in confidence for the purpose of fulfilling an official responsibility."

*Eighth*, the proposed amendment of section 552(b) (6) would make it clear that protection for personnel, medical, and similar "files," applies only to personnel, medical, and similar "records" in those files, and not to other kinds of records that may be in such files. This is consistent with the interpretation the Department of Defense has always given to this exemption; we, therefore, see no need for the amendment.

*Ninth*, the suggested revision of subsection (b) (7) of 5 U.S.C. 552 is not an improvement in either the clarity or effect of that exemption. The insertion of the word "specific" before the term "law enforcement purposes" does little, if anything, to define or limit the intended scope of the exemption. Presumably, any investigation for a law enforcement purpose must have some specific objective in mind. We are left with the question of how specific a "specific purpose" must be. If the intent is to limit the exemption to situations in which the

investigation is intended to culminate in a decision whether to commence an administrative or judicial action against an individual, corporation, or other organization, then further clarification of the language is necessary. However, we would not be in favor of such a change because it would further limit the flexibility now available to the agencies which require some discretion in determining which matters should be protected under the investigatory file exemption.

More importantly, the Department of Defense strongly objects to the proposed addition of subsection (b) (7) (B) that would remove the investigatory record exemption from scientific tests, reports, or data; from inspection reports which relate to health, safety, and environmental protection; and from all investigatory records which serve as a basis for an agency's public policy statements or rulemaking. Although no definition of "scientific" is given, we would have considerable concern under this modified language about the authority to protect from public disclosure various laboratory tests, polygraph reports, and similar records which may have been developed for the purpose of determining whether law enforcement action is justified. Release of this material to "any person" could unfairly and unnecessarily damage the reputation of the subject of an investigation and would provide nothing of legitimate concern to anyone other than the subject of the investigation and the agency performing it.

Similarly, inspection reports conducted by agencies for the purpose of law enforcement actions related to health, safety, and environmental protection should not be generally available to the public, particularly when the result of such a report does not justify a contemplated punitive law enforcement action. These reports, especially when read out of context, and without benefit of the entire background of the investigation, could be unfair to the subject of the investigation and mislead the public.

The requirement that investigatory records which serve as a basis for public policy statements or rulemaking by an agency be made available to the public has considerable appeal, but seems misplaced in this context. We would agree that that agency should be prepared to reveal the basis for a public policy statement or rulemaking no matter what its source may be. We do not believe, however, that all investigatory file records should necessarily be made available to the public when they constitute some basis for a public policy statement or rulemaking by the agency if a self-sufficient rationale for such action is disseminated by the agency. If, for example, an investigation of a conflict of interest situation concerning a government employee leads to the determination by the agency that it must strengthen its regulation governing conflicts of interest or must issue a public policy statement concerning proper conduct by its employees, we do not believe that this justifies a revelation of all of the records in the investigatory file concerning the particular employee whose conflict of interest situation may have stimulated the action. We, therefore, recommend that any provision deemed necessary to require an agency to reveal the basis for its public policy statement or rulemaking be inserted in section 553 of title 5 U.S.C. or in section 552(a) (I) (D).

*Tenth*, the provision in Section 3 of the bill that agencies shall furnish information to Congress and its committees upon written request is consistent with the current policy established by President Nixon in his memorandum of March 24, 1969, to the Heads of Executive Departments and Agencies, and by the Statement by the President dated March 12, 1973. To the extent the proposed Section 3 is intended to modify the procedures, set forth by the President, and based on his Constitutional prerogatives and responsibilities, it would, of course, be ineffective.

*Eleventh*, Section 4 of the bill would require each agency to maintain complete statistics on the number of requests for records made to the agency under the Freedom of Information Act, the number and reasons for refusals to provide requested records, the number of appeals from such initial refusals, the number of days taken by agencies to answer initial requests and appeals of denials, and the number of complaints received from citizens about agency compliance with the Act. This information, along with a copy of any rule made by each agency implementing the Freedom of Information Act, and other information regarding efforts to administer section 552, are to be submitted on or before March 1 of each calendar year to the Committee on Government Operations, House of Representatives, and to the Committee on Government Operations, United States Senate.



The Department of Defense believes that a requirement to keep accurate statistics on all requests for records made to this Department would be virtually impossible, and to the extent we could comply, useless, if not misleading. It must be assumed that any request for a record is made under the Freedom of Information Act. Otherwise, we would be obliged to try to distinguish among requests on the basis of whether it contained some specific reference to the Act, or attempt to determine by some other means on what basis the request was made.

Of the thousands of requests made to the Department of Defense each year for copies of records, the vast majority are satisfied without any Freedom of Information Act issue being considered. It is only in a relatively small percentage of cases that any serious issue arises on whether the information should not be provided because a significant and legitimate governmental purpose requires withholding and because an exemption of the Act authorizes withholding. It has been, and remains, our position that monitoring these exceptional circumstances provides a better picture of the Department's compliance with the letter and spirit of the Freedom of Information Act, and consequently, we believe that statistics on these exceptional cases are most likely to prove meaningful to the Congress.

At a time at which we are attempting to decrease the amount of unnecessary paper work and record-keeping, we strongly urge that any statutory requirement for record-keeping by the agencies on Freedom of Information Act requests be limited to those cases in which a record has been refused initially or on appeal. If the proposed subsection (d)(1) were deleted and subsection (d)(4) were modified to require computation of processing time only when requests for records are refused, these particular objections would be mitigated. A preferable alternative, however, would be a formal request from interested Congressional committees that statistics on Freedom of Information cases be maintained and submitted to them periodically. Modification in the requirement could be made far more readily than a statutory change, and this would encourage flexible response to a continuing evaluation of the utility of the data.

*Twelfth*, if extensive changes in the Freedom of Information Act, such as those proposed in this bill are enacted, we believe, on the basis of past experience, that ninety days does not offer enough time for worldwide agency implementation. Consequently, we recommend that Section 5 be modified to extend the effective date to the "one hundred and eightieth day after the date of enactment."

Although the tenor of this report has been largely negative, we believe that continuing efforts by Congress to study the provisions of the Freedom of Information Act are highly desirable as a means of responding to growing experience with its operation. There are numerous other aspects of the administration of the Freedom of Information Act which we believe could be improved, and we stand ready to assist the Committee in offering whatever information on our experience and problems with the Act that it may request. We are constrained to add, however, that much of the bill would not promote such improvements.

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this report for the consideration of the Committee.

Sincerely,

J. FRED BUZHARDT.

DEPARTMENT OF JUSTICE,  
Washington, D.C., July 12, 1973.

HON. SAM J. ERVIN, JR.,  
*Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary,*  
*U.S. Senate, Washington, D.C.*

HON. EDMUND S. MUSKIE,  
*Chairman, Subcommittee on Intergovernmental Relations, Committee on Govern-*  
*ment Operations, U.S. Senate, Washington, D.C.*

HON. EDWARD M. KENNEDY,  
*Chairman, Subcommittee on Administrative Practice and Procedure, Commit-*  
*tee on the Judiciary, U.S. Senate, Washington, D.C.*

DEAR MESSRS. CHAIRMEN: In his appearance before your subcommittee on June 26, 1973, Attorney General Richardson pledged to provide you with a more detailed explanation of the Department's views on S. 1142, a bill to amend the Freedom of Information Act. This is in response to that pledge.

S. 1142 is basically designed to make the Act as clear as possible, and to make government records even more quickly and fully available than at present. We

are, of course, sympathetic to those purposes and wish to reiterate the Department's firm commitment to ensuring the vitality of the public's "right to know" to the greatest extent consistent with sound government. However, as the Attorney General explained, albeit in a larger context: "Secrecy is . . . a paradox. It is a threat as well as a necessary incident to democratic government." The Freedom of Information Act is directed to balancing these competing principles by providing that disclosure of government records is to be the general rule, yielding only to such compelling considerations as those provided for in the Act's exemptions. As enacted, the Act imposes an affirmative obligation on the Executive branch not to withhold access to government information unless it is specifically exempted by the Act and its release would not be in the public interest.

Based upon our broad experience in this area, it is our view that the principle solution to the problem of providing more public access to government documents and information lies not so much in revising the language of the Act, as in improving administrative compliance with its present provisions.

To this end, the Attorney General stated before your subcommittees that the Department is considering several ways to ensure greater compliance, including conducting training seminars and publishing freedom of information manuals or newsletters. In addition, he announced that four steps would be taken now to encourage better administration of the Act. These steps include: (1) a request to the Civil Service Commission to include freedom of information material in its training programs; (2) an interagency symposium to be conducted by the Department before the end of the year on the Freedom of Information Act in which ideas on how to improve administration will be discussed; (3) establishment of a task force to study how the Executive branch can better organize itself to administer the Act; and (4) a reminder to the various federal agencies of their responsibility to consult with the Department's Freedom of Information Committee before issuing final denials of requests under the Act and an order to the Department's litigating divisions not to defend a law suit unless this procedure has been followed. Taken together, these measures represent a concerted effort to ensure that no more information is withheld than is absolutely essential.

In view of the recent development of these proposals to increase compliance with the Act, we believe it would be reasonable to delay extensive amendment of the Act until these programs can be implemented and their results evaluated.

Apart from these general observations on the need and utility of amending the present Act, the Department has the following comments and recommendations concerning the provisions of the bill.

1. Section 1(a) of S. 1142 would amend the indexing provisions in subsection (a) (2) of the Act. This provision now requires every agency to maintain and make available for public inspection and copying indexes of those documents having precedential significance. The proposed amendment would go further and compel all agencies to publish and distribute such indexes.

While the theory of this amendment is salutary, in practice and as a government-wide requirement it would be expensive and essentially unnecessary.

Under the existing indexing scheme, persons who ask to use the indexes are permitted to do so. However, a large segment of the public may never have the interest or the need to use them. Thus, the considerable expense of preparing for publication, publishing, and keeping current indexes that are not oriented to a demonstrated public need would be unjustified. Even where an index does meet a need, such as a card catalogue in a library, it does not appear that the expense of publishing would be warranted.

In these cases, it is generally more practical, economical, and satisfactory to the outside person seeking information to give him direct personal assistance that fits his existing knowledge and information, rather than referring him to some index which may be largely incomprehensible because it was compiled by specialists for their own use, or to tell him to buy a published index. Moreover, a large enterprise has developed among private concerns in publishing agency materials and compiling their own indexes. For example, Congressional Clearing House and Prentice-Hall publish fully indexed tax services. To require the government to index and publish the same material would be an inefficient and expensive duplication of function.

We recommend that this amendment not be adopted until all affected agencies have had an opportunity to determine its probable impact on their staffs and budgets in relation to estimated public benefits, or until possible alternative devices which may be more effective, simpler to use, more easily kept up-to-date and less costly have been considered.

2. Section 1(b) of the bill would amend Subsection a(3) of the Act so that requests for records would no longer have to be "for identifiable records," requiring instead that a request for records "reasonably describes such records." We view this change to be essentially a matter of semantics and thus unnecessary. The Senate Report in explaining the use of the term "identifiable" in the present Act, stated: "records must be identifiable by the person requesting them, i.e. a reasonable description enabling the Government employee to locate the requested records."

Because it does alter the wording of the statute, this amendment might lead to confusion as well as to unwarranted withholding of requested records. An unsympathetic official might reject a request which would have to be processed today, on the new ground that the request is not reasonably descriptive. Also, this amendment could subject agencies to severe harassment, as where a requester adequately described the Patent Office records he sought, but his request was for about 5 million records scattered through over 3 million files. A court, presumably unable to accept anything so unreasonable, held that the request was not for "identifiable records." *Irons v. Schuyler*, 465 F.2d 608 (D.C. Cir. 1972). Accordingly, we conclude that this change would not be desirable at this time.

3. Section 1(c) of the bill would amend the Act by imposing time limits of 10 working days for an agency to determine whether to comply with any request and 20 working days to decide an appeal from any denial. The purpose of imposing these deadlines is to expedite agency action on requests for information. The time limits are absolute and no extensions are permitted. As the Attorney General explained in his testimony before your subcommittees, agencies should respond to such requests as expeditiously as possible, however this amendment is far too rigid for permanent and government wide application and is likely to be counter-productive to the ultimate purpose of optimizing disclosure by discouraging the careful and sympathetic processing of requests.

4. Section 1(d) of S. 1142 would impose an automatic requirement in any suit under the Act for an *in camera* inspection by the court, and if the records were withheld under the 1st exemption the court would further be directed to decide whether disclosure would injure foreign relations or national defense. These provisions, and the Department's opposition to them were discussed at length by the Attorney General in his testimony.

5. Section 1(e) would reduce the present 60-day period which the Government normally has to answer complaints against it in federal court to 20 days for all suits under the Act. It would also provide for an award of attorneys fees to the plaintiff in any such suit in which the government "has not prevailed," leaving it unclear what might happen in cases where the government prevails on part of the records in issue but does not prevail on the rest.

We oppose both features of this section. When a suit is filed under the Act, the local U.S. Attorney ordinarily consults the Department of Justice. The Department in turn must consult the agencies whose records are involved, and frequently that agency must coordinate internally among its headquarters components or its field offices, and sometimes externally with other agencies. Because the federal government is larger and more complex, and bears more crucial public interest responsibilities than any other litigant, it needs more time to develop and evaluate its positions, especially if they may affect agencies other than the one sued. A 20-day rule would require that decisions be made without ample time for comprehensive study and consequently the incidence of positions that would later be reformulated would increase, causing unnecessary work for both parties and the courts.

Furthermore, in a type of litigation which can be initiated by anyone without the customary legal requirements of standing or interest or injury, the award of attorneys fees is particularly inappropriate. It is difficult to understand why there should be departure in this area of law from the traditional rule, applied in virtually every other field of Government litigation, that attorneys fees may not be recovered against the Government.

Plaintiffs involved in Information Act cases often have less financial need for these proposed awards than in other types of litigation, because under the Act the burden of proof is upon the defendant, and because the expense of an evidentiary trial with oral testimony is rarely encountered. Moreover, although the Act has been used successfully by public interest groups to vindicate the public's right to know, not all litigants fit that category. Instead, the plaintiff may well



be a businessman using the Act to gain information about a competitor's plans or operations. Or he may be someone seeking a list of names for a commercial mailing list venture. In all such cases, the obvious end result if attorneys fees were awarded would be that the taxpayers would pay for litigating both sides of the dispute.

6. Section 2(a) of S. 1142 would amend the second exemption to restrict it solely to internal personnel matters and exclude any other internal operating matters. The House Report which preceded enactment of the Act expressly construed this exemption to cover certain operating instructions, the disclosure of which might cripple effectiveness in agency operations.

We believe that analysis is still valid today for the reasons advanced by the Attorney General in his appearance before your subcommittees. If laws are to be fairly and diligently enforced and Congressional programs effectively implemented, agencies must be able to give instructions and guidance to their own staffs without exposing these instructions, routinely and under compulsion of law, to the very persons whom the agencies must investigate, audit, regulate, inspect, or negotiate with. The moment such operations become predictable, their usefulness is destroyed. Accordingly, we believe an amendment of exemption 2 which would expressly protect such operating rules used for purposes similar to those described above would be desirable.

7. Section 2(b) of this bill would amend the fourth exemption. This exemption is designed to assure the confidentiality of information submitted to the government by private persons, usually businessmen, who would otherwise refuse to furnish such information voluntarily or customarily release it to the public. The proposed amendment would limit this protection to business-type confidential information.

As the Attorney General stated the Department opposes an amendment which would place confidential information of the type likely to be furnished by businessmen in a favored class as compared to information furnished confidentially by other citizens which also deserves protection.

8. Section 2(c) would amend the sixth exemption. As now written, this provision exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The amendment would change the word "files" to read "records." It appears this change is predicated upon the assumption that agencies may place in "files" documents or records which should not be in those files and which the public should have a right to know about. Although we are not aware of any incident in which this has actually happened, we agree that the existing exemption should be interpreted along the lines of the proposed amendment and that records which would not otherwise be exempt should not be withheld merely because they are contained in a personal file.

9. Section 2(d) of the bill would amend the seventh exemption, which covers "investigatory files compiled for law enforcement purposes" in several respects. The word "files" would be changed to "records," the phrase "law enforcement purposes" would be changed to "any specific law enforcement purpose the disclosure of which is not in the public interest," and the exemption's coverage would be restricted to exclude (i) records of scientific tests, (ii) inspection records relating to health, safety or environmental protection, and (iii) any investigatory records which are also used as a basis for public policy statements or rulemaking.

In his statement, the Attorney General described how these changes would seriously impair our ability to enforce the laws. He also noted that the Administrative Law Section of the American Bar Association opposed these changes in the seventh exemption on similar grounds and had recommended an alternative approach which would set forth explicitly the objectives which the investigatory files exemption is intended to achieve in order to assure that information is withheld only if one of those objections would be frustrated were the information disclosed. Under their proposal only that material contained in an investigatory file compiled for law enforcement purposes which would disclose informants or investigative techniques, interfere with enforcement proceedings, or deprive a person of the right to a fair trial could be withheld.

Although not agreeing that exemption 7 should be amended, the Attorney General suggested that, if a fresh approach is needed, a modified version of the ABA's proposal be considered. This suggestion provides that information contained in an investigatory file pertaining to a pending or contemplated law

enforcement proceeding or investigation is exempt in its entirety from disclosure. All other files are publicly available except to the extent that the production would impair a person's right to a fair trial, disclose informants, investigatory techniques or jeopardize law enforcement personnel, their families or assignments, or damage the reputation of innocent persons. As such, this approach serves a dual purpose. It protects the law enforcement efficiency of this and other Departments as well as the privacy or confidentiality of any individual mentioned in such files, and, at the same time, permits public access to much of the material contained in these files.

The approach, however, was not intended to encompass FBI files or those of similar agencies whose primary responsibility is to investigate criminal activities. According to the legislative history of the Act, the seventh exemption was not to affect the FBI's investigative files at all. Therefore, this proposal was directed to those agencies and divisions of the government which perform investigative activities merely as an incident to their other statutorily imposed functions. For example, the Agriculture Department is charged with the responsibility of regulating and inspecting meat processors to ensure wholesome products. Part of that obligation includes the power to investigate and recommend the filing of criminal charges for noncompliance with inspection standards. Investigatory files compiled by Agriculture in this connection would thus be made available for public inspection under this approach subject only to the deletion categories and providing no enforcement action was pending.

Because, however, there may be some misunderstanding as to which agency files are available under the proposal suggested by the Attorney General above and because there is a legitimate public interest in obtaining information of an historical interest, we propose that the following language be added to it. Immediately after the words "Provided, That" we suggest the insertion of the clause "with respect to files compiled by noncriminal law enforcement agencies or files compiled by criminal law enforcement agencies that are more than — years old."<sup>1</sup> The proposal would then read as follows:

"The provisions of this section shall not be applicable to matters that are \* \* \* (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency; *Provided, That* with respect to files compiled by noncriminal law enforcement agencies, or files compiled by criminal law enforcement agencies that are more than — years old, this exemption shall be invoked only while a law enforcement proceeding or investigation to which such files pertain is pending or contemplated, or to the extent that the production of such files would (A) interfere with law enforcement functions designed directly to protect individuals against violations of law, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) disclose the identity of an informant, (D) disclose investigatory techniques and procedures, (E) damage the reputation of innocent persons, or (F) jeopardize law enforcement personnel or their families or assignments."

By addition of this language, public access to investigatory files is further liberalized and the distinction between the availability of public access to the files of noncriminal law enforcement agencies and criminal law enforcement agencies, such as the FBI, is made clear. Under this approach the public is given public access to all the investigatory files of noncriminal law enforcement agencies once there is no longer pending or contemplated a law enforcement proceeding or investigation. Of course, the material contained in these files is subject to deletion if it fits within one of the enumerated deletion categories or if it concerns a matter which is exempt under one or more of the other exemptions of the Act. On the other hand, all information contained in an FBI or similar agency file which is within the statutory period is exempt from compulsory disclosure regardless of whether or not an enforcement proceeding or investigation is pending or contemplated. Such files that are not within the statutory period and which are "closed" are not exempt. Names of informants, defamatory material affecting innocent persons, etc. would still be subject to deletion however. This approach therefore permits the public, especially historical researchers, to gain some access to even criminal law enforcement agencies' records

<sup>1</sup> The Department does not express a judgment as to a specific time limit for general access to "closed" investigatory files that would accommodate vital law enforcement interests. By order dated July 11, 1973 the Attorney General instituted an experimental program granting historical researchers limited access to files of particular historic interest that have been "closed" 15 years or more. The program is as yet untested. Further experience may indicate whether this time period is sufficiently long to protect the legitimate concerns of law enforcement agencies.

In sum, although we do not believe that an amendment of exemption 7 is needed at this time, we believe, if it is decided to amend it, that the proposal outlined above represents a reasonable compromise between the interests of the public's right to know and the protection of the integrity of the law enforcement process.

10. Section 3 of the bill would require every agency in the Executive branch to furnish any information or records in its possession to Congress upon request. In our opinion, this provision involves a direct attack on the separation of powers system established by the Constitution, and is therefore unconstitutional.

11. Section 4 of S. 1142 would require each agency to submit an annual report to Congress containing a statistical evaluation of the duties executed in administering the Act. Congress certainly has an interest and responsibility to keep informed on how the Act is being administered. Accordingly, we support the general objectives of this amendment. Nevertheless, we do not believe that legislation is necessary to accomplish this end. In the past, agencies have appeared before committees of both houses of Congress on numerous occasions and discussed their administrative operations. Statements, complete with statistical information, have been submitted on those occasions for congressional review. Similar information as that proposed to be included in the annual reports was obtained by the House Committee on Government Operations in 1971 by means of a questionnaire. These methods have the obvious advantage of flexibility and enable Congress to receive the information it needs without being locked into a fixed system of reporting requirements. For this reason, this provision seems undesirable.

In view of the foregoing, the Department of Justice recommends against the enactment of this legislation in its present form.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

MIKE McKEVITT.

OFFICE OF THE SECRETARY OF TRANSPORTATION,  
Washington, D.C., June 13, 1973.

HON. JAMES O. EASTLAND,  
*Chairman, Committee on the Judiciary,*  
*U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: Your Committee has asked for the views of this Department concerning S. 1142, a bill "To amend section 552 of title 5, United States Code, known as the Freedom of Information Act."

This bill would impose additional procedural requirements on Government agencies in responding to requests for information and in making determinations on appeal; it would substantially narrow the present exemptions from mandatory disclosures; and it would require detailed record keeping as a basis for annual reports to Congress concerning each agency's activities under the Freedom of Information Act.

The Department is generally sympathetic to the broad purpose of the bill, which is to clear up present ambiguities in the Freedom of Information Act, and to make Government records available to the greatest extent possible. We are opposed, however, to the amendments as proposed, because they would create new ambiguities and increase the costs and administrative burdens on the Government to an extent not justified by any additional benefits the public might receive. Our objections to specific provisions are set forth below.

*Section 1(a).* The requirement for publication and distribution (by sale or otherwise) of the current index of all final agency orders, opinions, policy statements, interpretations, and staff manuals and instructions is unnecessary. The Department receives few requests for copies of the index, and the present system of maintaining a current index and making it available for public inspection and copying has served the public adequately without unduly burdening the Government.

*Section 1(b).* The proposal to change the requirement that a request be for "identifiable records", and require instead a request which "reasonably describes such records", would create new problems of interpretation. Moreover, the proposed language might provide a basis for withholding records because an agency determined that they were not reasonably described in the request.



*Section 1(c) and 1(d).* The absolute requirement that an agency make its determination within 10 days after receipt of an initial request, make a determination with respect to an appeal within 20 days after receipt of the appeal, and make its answer to a complaint in a court action under the Freedom of Information Act within 20 days after service of the complaint on the United States Attorney, is unnecessarily rigid.

Some flexibility is necessary for situations where the records initially requested are stored at other locations (such as field offices), where the request covers a substantial number of records, where the request is couched in categorical terms and requires extensive search, where the records are classified, or where unusual difficulties are encountered in locating the records. Most requests for records are complied with promptly, but in those cases where an exemption is involved, review may require evaluation by persons competent to determine whether the documents are exempt, and whether they should be released with appropriate deletions. Insufficient time to make an analysis as to whether an exempt document should be disclosed as a matter of policy might encourage agencies to rely on exemptions whenever available.

The requirements that an agency rule on an administrative appeal within 20 days, and file an answer to a complaint served on the United States Attorney within 20 days, are both unrealistic. In a large Department such as ours, with many operating administrations and many field offices, a final denial of a request, or an answer to a complaint, must be coordinated first within the administration immediately concerned, then with the Department's General Counsel, and then with the Department of Justice. In connection with the filing of an answer to a complaint, it is often necessary to prepare affidavits, draft legal memoranda and coordinate the proposed answer with both the Civil Division of the Department of Justice and the United States Attorney's office.

The Department is also opposed to the assessment of attorney fees against the United States in cases brought under the Freedom of Information Act in which the United States does not prevail. There is no reason to treat these cases differently from others in which the United States is a party.

*Section 2(a).* The proposed addition of the words "the disclosure of which would unduly impede the functioning of such agency" would create another problem of interpretation.

*Section 2(b).* The proposal to amend exemption (4) would unduly narrow the exemption and may be subject to the interpretation that non-commercial and non-financial information may be made available. We therefore oppose this section.

*Section 2(d).* This amendment would narrow the "investigatory files" exemption of 5 U.S.C. 552(d)(7). It would limit the exemption to "investigatory records compiled for any *specific* law enforcement purpose the disclosure of which is not in the public interest." We oppose such a change, since it would make available records compiled in the course of investigations which do not relate to specific enforcement cases. Pursuant to its legal mandate, the Department undertakes many investigations for law enforcement purposes without reference to a particular incident or violator.

This amendment appears to require disclosure of factual investigatory records regardless of whether an investigation is open or closed. It may also be undesirable to require disclosure even after the investigation is closed.

The amendment would except from exemption (7) scientific tests, reports or data, and inspection reports relating to health or safety. A number of Federal statutes give agencies law enforcement responsibilities that can be carried out only through scientific and technical testing. For example, the National Highway Traffic Safety Administration (NHTSA) enforces the Motor Vehicle Safety Standards by laboratory testing of sample vehicles. If NHTSA were compelled prematurely to disclose the results of its tests, particularly to motor vehicle manufacturers, the results would be a crippling of its enforcement program. A similar situation could arise in connection with the Bureau of Motor Carrier Safety inspection of motor carrier facilities and vehicles concerning health or safety. Since the "public" includes the motor carriers who are the subject of enforcement cases arising out of those inspections, the premature disclosure of the evidence in such inspection reports could frustrate our enforcement program.

*Section 3.* Proposed new subsection (d) would require agencies to submit annual reports to Congress on the number of requests for records received, the number of denials, the number of appeals, the number of days taken for initial

determinations and for appeals, the number of complaints filed in court, etc. Compliance with this section would necessitate the establishment of special record keeping systems requiring field offices of agencies to route all action on requests for documents through a central Federal office. In our opinion it is desirable that agencies keep records of the number and basis of initial denials, appeals, and final denials, but we question the necessity of desirability for keeping such detailed records of all requests routinely granted and for annual reporting, because of the burden placed on the Government in terms of time and money expended.

The Office of Management and Budget advises that from the standpoint of the Administration's program there is no objection to the submission of this report to the Committee.

Sincerely,

JOHN W. BARNUM.

ATOMIC ENERGY COMMISSION,  
Washington, D.C. June 5, 1973.

HON. JAMES O. EASTLAND,  
Chairman, Committee on the Judiciary,  
U.S. Senate, Washington, D.C.

DEAR SENATOR EASTLAND: Thank you for the opportunity to comment on S. 1142, a bill "[t]o amend section 552 of title 5, United States Code, known as the Freedom of Information Act."

The Atomic Energy Commission opposes enactment of S. 1142 as presently written.

In general, S. 1142 would amend the Freedom of Information (FOI) Act to require the publication and distribution of a current index of various matters required to be made public. Time limits would be established for agency response to a request for documents and for processing appeals from initial denials. In a case where an injunction is sought against an agency's withholding of records, a district court would be required to determine the propriety of classification of a record and also whether disclosure of such a record would harm the country's national defense or foreign policy. The bill would permit assessment of certain litigation costs against the Government when it did not prevail in an FOI action. Various exemptions from disclosure under the FOI Act would be amended. Positive requirements would be established for furnishing information requested by Congress. Finally, the bill would provide for an annual report to cognizant Congressional committees by each agency on its activities under the FOI Act. Specific provisions of S. 1142 are detailed as necessary in the comments which follow.

From the Commission's viewpoint, the most significant provisions in the bill are those provisions relating to time limits, *in camera* inspection, and exemptions.

Section 1(c) of the bill would require an agency response to an FOI Act request within ten days, and would require appeals to be processed within 20 days. The section would also seem to make administrative appellate rights mandatory.

The limitation of ten days to determine whether to comply with an FOI Act request is unreasonable. The Atomic Energy Commission cannot function within rigid time limits for all requests, some of which involve nearly 20,000 pages.

This agency would similarly oppose an absolute requirement for handling an appeal within 20 days. We are also concerned with the implicit requirement for administrative appellate rights. The AEC's regulations on public records, 10 CFR Part 9, already require denial decisions to be made at the highest administrative echelon (the General Manager or the Director of Regulation, as appropriate). Thus, we regard such appellate procedures as unnecessary.

When litigation is instituted, section 1(d) of S. 1142 would reverse the Supreme Court decision in *EPA v. Mink* by requiring *in camera* inspection by district courts of agency records to determine whether such records should be withheld. With respect to classified documents, the bill would require not merely a determination as to whether the documents were classified in accordance to the non-executive procedures, but also whether disclosure "would be harmful to the national defense or foreign policy of the United States." We are concerned about the potential for delay which could result from the mandatory *in camera* inspection of all documents in issue. In addition, we question the desirability of forcing upon the courts the task of determining the harmful effects of the disclosure of classified documents.

Section 1(e) of the bill would impose a stringent limitation upon the Government in FOI Act litigation, requiring agencies to "serve an answer" within 20 days after service of the complaint upon a United States Attorney. At present, 60 days are allowed under the Federal Rules of Civil Procedure. This new requirement would pose several difficulties.

From the AEC viewpoint, defense of such a suit requires close coordination between a particular U.S. Attorney's office (which may be located anywhere in the country), the Department of Justice in Washington, and the agency branches (which are at various places in the country, including three separate locations in the Headquarters area). Geography itself, coupled with the fundamental logistics of the situation, shows that such a requirement would be practically impossible for this agency and could seriously impede our defense in FOI Act cases. In addition, the requirement that the Government serve "an answer" could be construed as precluding any pleading other than an answer to the merits of the complaint. If so, this change could rule out legitimate motions to dismiss, motions for judgment on the pleadings, motions for summary judgment, motions for change of venue, etc. Moreover, there might be situations where a good faith motion for a continuance would be proper, but even a valid motion could be out of order under this proposal.

This inflexible requirement for "an answer" could actually frustrate the purpose of the FOI Act by encouraging the Government to file automatic general denials in every case. To the extent that litigation naturally causes counsel to reexamine the Government's position, the benefit of this process could be lost by the mechanical 20-day requirement.

Finally, such a requirement would produce little of any consequence to a member of the public unless the courts were also required to issue rulings within time limits. It does no good to require a Government answer within 20 days where a court may take the matter under advisement for months.

With respect to the discretionary award of attorney fees, etc., when the Government "has not prevailed", it is not clear whether this provision is confined to those cases in which the Government has been found in error respecting every withheld document at issue in the case. Any case may involve an order partially upholding and partially reversing the Government.

Exemption 2 of the FOI Act now exempts matters "related solely to the internal personnel rules and practices of an agency; \* \* \*." Section 2(a) of S. 1142 would restrict this exemption by providing that the exempt "practices" must be "internal personnel practices"—a proposition which presently divides the courts. The more restrictive approach could be regarded as requiring production of matters relating to internal practices which are not "personnel" in nature. As a result, protection of items such as internal instructions to AEC reactor inspectors—covering scheduling of unannounced inspections, the range of matters to be examined, etc.—might be more difficult under the proposal. In our view, there are legitimate reasons to exempt certain matters relating to internal practices, even though the subject is not "personnel".

The further condition added to exemption 2 by the new bill—limiting its application to those internal personnel rules and internal personnel practices, the disclosure of which "would unduly impede the functioning of" the agency—might create another complicated dispute which could detract from the goal of expedition in these matters.

The "proprietary" exemption from the present FOI Act allows the Government to withhold "trade secrets and commercial or financial information obtained from a person and privileged or confidential \* \* \*." Section 2(b) of S. 1142 would add the phrase "obtained from a person which are privileged or confidential" to the concept of trade secrets. The purpose of this amendment is unclear. We see no reason for changing the existing language in the absence of a convincing need.

Section 2(d) of the bill would limit the exemption of investigatory records to those the "disclosure of which is not in the public interest." More significantly, the amendment would list specific categories of material which could not be considered within the scope of the exemption (scientific tests, reports, or data; inspection reports relating to health, safety, or environmental protection; and records which serve as a basis for any public policy statements).

The "public interest" condition would inject another issue into disputes arising under this exemption. Moreover, we oppose the exclusion of whole categories of



materials from the existing exemption. The premature release of investigatory records may seriously affect a subsequent law enforcement proceeding even if the released material contained solely scientific data or inspection reports relating to health, safety, or the environment.

Section 3 of the bill would require prompt release of any information or records to Congress or any Congressional committee upon written request. The AEC is required by section 202 of the Atomic Energy Act to keep the Joint Committee on Atomic Energy "fully and currently informed" regarding AEC's activities. Beyond this statutory requirement, AEC has consistently been responsive to Congressional inquiries in general, both from individual members and from committees. In this connection, see also the AEC Freedom of Information Act regulations, 10 CFR 9.5(c), "... nor is this part authority to withhold information from Congress." We thus see no need for this provision of S. 1142 as regards the AEC.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

DIXY LEE RAY,  
*Chairman.*

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CIVIL AERONAUTICS BOARD,  
Washington, D.C., June 7, 1973.

Hon. JAMES O. EASTLAND,  
*Chairman, Committee on the Judiciary,*  
*U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: This is in reply to your request for the Board's views on S. 1142, a bill "To amend section 552 of title 5, United States Code, known as the Freedom of Information Act."

S. 1142 would amend the Freedom of Information Act in a number of respects. Among the principal amendments would be provisions imposing time limits of a specified number of days for an agency to determine whether to comply with a request for records, and to decide an appeal from a denial. Also, in any suit under the Act, an *in camera* inspection by the court would be an automatic requirement. Furthermore, the present 60-day period which the Government normally has to answer complaints against it in the Federal courts would be reduced to 20 days for all suits under the Act, and attorney fees could be awarded to the plaintiff in any suit in which the Government "has not prevailed." In addition, the scope of the exemptions relating to "internal personnel rules and practices"; "trade secrets"; "personnel and medical files"; and "investigatory files compiled for law enforcement purposes" would be narrowed. Moreover, the present provision stating that the Act is not authority "to withhold information from the Congress" would be modified so as to require an agency to furnish to Congress any information or records in its possession. Finally, each agency would be required to make an annual report to Congress containing various kinds of statistics on its administration of the Act.

Under the Act, each agency has the administrative responsibility for determining whether or not it will comply with a request for information. However, the Department of Justice conducts litigation in defense of agency determinations under the Act and furnishes certain advisory and other services pertaining to Freedom of Information problems. In an effort to coordinate activities among Federal agencies under the Act, on December 8, 1969, the Justice Department sent a memorandum to the General Counsels of all agencies stating that a Freedom of Information Committee was being created in the Department. The memorandum asked the agencies to consult the Department before issuing a final denial under the Act if there is any substantial possibility of litigation adversely affecting the Government.

In view of the responsibilities of the Department of Justice in this respect, the Board defers to the views of such Department as to the desirability of S. 1142.

The Board has been advised by the Office of Management and Budget that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

ROBERT D. TIMM, *Chairman.*

FEDERAL COMMUNICATIONS COMMISSION,  
Washington, D.C., June 13, 1973.

HON. EDWARD M. KENNEDY,  
*Chairman, Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: This refers to your May 17 request for the Commission's comments on S. 1142, a bill to amend section 552 of Title 5, United States Code, known as the Freedom of Information Act.

Specifically, section 1(a) of the bill would amend section (a) (2) of the Act to require Federal agencies to promptly publish, and distribute (by sale or otherwise) copies of a current index providing identifying information for the public as to matters issued, adopted or promulgated by the agencies after July 4, 1967. The present law requires that such indices be made available for public inspection and copying. The Federal Communications Commission Reports, 2d Series, contain all matters of precedential value issued, adopted or promulgated by the Commission since July 7, 1965. The cumulative indices to FCC 2d, as well as the reports themselves, each of which contains a table of documents by title and main parties, are available for sale by the United States Government Printing Office. Thus, the Commission presently complies with, and has no objection to, this section of the bill.

Section 1(b) of the bill would amend subsection (a) (3) of the Act to require each agency, upon any request for certain records which "reasonably describes" such records, and is made in accordance with published rules stating the time, place, fees, to the extent authorized by statute, and procedures to be followed, to make the records promptly available to any person. The present statute requires that such requests be for "identifiable records." The Commission has no objection to the bill's substitution of the phrase "reasonably describes" for the phrase "identifiable records" so long as the reasonable description contemplated is sufficient to permit the identification and location of the records requested.

Section 1(c) of the bill would add a new paragraph to section (a) (5) of the Act. Subparagraph (A) of the new section would require each agency to make its initial determination on Freedom of Information requests within ten working days. The Commission is of the opinion that the imposition of a specific time limit of such short duration is impracticable. The agency has no control over the number, nature and scope of requests for records, and the circumstances surrounding them vary extensively. Most requests involve records which are routinely available for public inspection and can be handled within a very short time period by the bureau or office which keeps the records. In some cases, however, the request may involve an extensive list of records of a diverse nature, which may be kept at different locations, involve a series of searches by various persons, and may involve a variety of legal or policy questions. Under the Commission's rules implementing the Freedom of Information Act, requests for materials not routinely available for public inspection are acted on initially by the Commission's Executive Director. The Executive Director consults with the bureau or office which exercises responsibility over the subject matter of the request, and often requires detailed information from the bureau or office concerned in order to properly act upon the request. In addition, the Executive Director consults the General Counsel's Office before action upon a request, and in certain cases the General Counsel may need time to consult formally or informally with the Justice Department before advising the Executive Director. Some cases warrant consideration by the full Commission prior to disclosure.

In addition, the Commission's implementing rules presently provide safeguards designed to protect the rights of certain persons who provide materials to the Commission. For example, when a request relates to papers which contain trade secrets, commercial or financial information, or which were submitted in confidence by third parties, persons having an interest in nondisclosure of the records are afforded an opportunity to comment on the request, and to request Commission review of any adverse staff ruling. Such safeguards, which the Commission believes to be in the public interest, would probably have to be abandoned if the bill's general ten day limitation were enacted.

The Commission, of course, recognizes the importance of expeditious handling of requests for records under the Freedom of Information Act. The computations of the House Foreign Operations and Government Information Subcommittee reveal that for the agencies analyzed, the average number of days taken to respond

to initial requests was 33, and the average number of days taken to respond to appeals from initial requests was 50 (Hearings before the Foreign Operations and Government Information Subcommittee of the House Committee on Government Operations on U.S. Government Information Policies and Practices—Administration and Operation of the Freedom of Information Act, 92nd Cong., 2d Sess. pt. 4, p. 1337). The Commission's average in these two categories was 27 days and 30 days respectively (Hearings, p. 1341). The Commission's averages include requests for access to trade secrets, commercial and financial information, the notification and response procedures for which were detailed above. In fact, the Commission receives more requests for access to records which fall under the trade secrets exemption than requests falling under any other exemption. Thus, although the Commission has endeavored to act upon requests for records under the Freedom of Information Act as rapidly as practicable, our experience indicates that due to the diverse nature of requests, and the variety of circumstances in which they arise, the bill's imposition of an inflexible standard ten day period for action upon all initial requests is not appropriate or desirable. For similar reasons, we would also find it impracticable to comply with the requirements of subparagraph (C) that each agency act upon an appeal from any denial of a request for records within twenty working days.

Subparagraph (B) of the new paragraph (5) requires each agency denying a request for records under the Act to notify the person making the request that he has twenty working days within which to appeal the denial to the agency. It is our normal practice that our Executive Director's letters which deny a request, wholly or in part, contain an explanation of the individual's right to file an application for review. Although the Commission's rules provide thirty days within which to file an appeal, we have no objection to either the proposed notification requirement or time limitation.

We note that in all three subparagraphs, (A), (B), and (C), the time period begins running on the day of receipt of the request, denial, and appeal respectively. In all three cases, if the mode of communication is by letter the sender would generally not know when the statutory period had passed, since he normally would not be aware of the exact date on which his communication was received.

Section 1(d)(1) of the bill would amend subsection (a)(3) of the Act to authorize the United States District Courts with appropriate jurisdiction hearing the appeal of a final agency determination to examine the contents of any agency records in camera to determine if such records or any part thereof should be withheld under any of the nine exemptions listed in subsection (b) of the Act. The Commission has no objection to this section.

Likewise, we find no objection to section 1(d)(2) of the bill which also amends section (a)(3) of the Act to authorize the court to examine agency records in camera to determine whether the disclosure of records withheld under authority of subsection (b)(1) of the Act (specifically required by Executive Order to be kept secret in the interest of national defense or foreign policy) would be harmful to the national defense or foreign policy of the United States.

Section 1(e) of the bill would add two new sentences to the end of subsection (a)(3) of the Act. The first requires an answer within twenty days after service upon the United States attorney of a complaint alleging a violation of the Freedom of Information Act. The Department of Justice is the entity of primary responsibility with regard to this provision and the Commission would defer to any views that Department has on this issue. The second new sentence of subsection (a)(3) would authorize the court to assess reasonable attorney fees and other litigation costs against the United States when the court rules against an agency under the Freedom of Information Act. Title 28 U.S.C. § 2412 provides that court costs may be awarded to the prevailing party in any civil action brought by or against the United States (since July 18, 1966), except as otherwise specifically provided by statute. We know of no statute which would prevent a court which overruled a Commission decision under the Freedom of Information Act from awarding costs to the prevailing party. This statute generally places the United States and its agencies on the same footing as private parties with respect to the award of costs in civil cases. Rule 39 of the Federal Rules of Appellate Procedure allows a similar result in appeals cases. Thus, if the section's reference to "other litigation costs" contemplates the award of court costs to the prevailing party, the reference seems unnecessary.

On the other hand, Section 2412, in keeping with standard American jurisprudence, specifically exempts from its provisions the awarding of attorney fees



to the prevailing party. The Commission, therefore, does not support the bill's reference to the award of attorney fees to the prevailing party because we do not see sufficient justification for singling out Freedom of Information litigation for such treatment.

The Freedom of Information Act presently requires (5 U.S.C. 552(b)) that information be made publicly available except for nine specific exempt categories. Section 2 of the bill would amend four of the exemptions presently contained in subsection (b) of the Act. Specifically, section (2)(a) would amend subsection (b)(2) of the Act (internal personnel rules and practices) by adding an additional "internal personnel" before practices, and by adding at the end of the exemption the phrase, "and the disclosure of which would unduly impede the functioning of the agency." The Commission's rule implementing exemption (2) of the Act presently provides for disclosure of internal management matters "unless their disclosure would interfere with or prejudice the performance of the internal management functions to which they relate, or unless their disclosure would constitute a clearly unwarranted invasion of privacy." Although the bill's "unduly impede" language appears on its face to be a more restricted exemption than the phrase used in the Commission's rule, we do not object to the bill's language.

The Commission reads section 2(b) of the bill as a clarification of the present meaning of the trade secret's exemption contained in subsection (b)(4) of the Act. We point out that the clarification would, of course, have no effect on the United States Criminal Code's prohibition against the unauthorized disclosure of certain confidential information (e.g., trade secrets, operations, processes, etc.) by Federal government employees.

Section 2(c) of the bill substitutes the word "records" for "files" with regard to the personnel and medical files exemption set forth in subsection (b)(6) of the Act. The Commission's rule implementing exemption (6) uses the word records, and we thus support the amendment.

Section 2(d) of the bill amends the exemption contained in subsection (b)(7) of the Act relating to investigatory files compiled for law enforcement purposes. Initially, the amended section would exempt investigatory *records* compiled for any specific law enforcement purpose *the disclosure of which is not in the public interest* (new language indicated by underlining). Although we have no particular objection, the Commission is not clear as to the distinction to be made between a "specific" as opposed to a general investigatory file. Likewise, although we do not object to the bill's requirement that a public interest determination be made, we point out that the legislative history of the Freedom of Information Act specifies as a purpose of the bill elimination of the government's withholding legitimate information on the basis of "secrecy in the public interest" (S. Rept. No. 813, 89th Cong., 1st Sess., p. 3).

Section 2(d) of the bill lists three exceptions to the investigatory records exemption. The Commission has no objection to the first two, (i) scientific tests, reports, or data, and (ii) inspection reports of any agency which relate to health, safety or environmental protection. On the other hand, we have some difficulty with the third exception to the investigatory records exemption which excepts records which serve as a basis for any public policy statement or rulemaking by an agency. The Commission's rule implementing exemption (7) essentially provides that a complaint against a licensee will be made available for inspection upon request "if it appears that its disclosure will not prejudice the conduct of the investigation." The rule further provides for availability of a complaint when it has been determined that no investigation should be conducted or when the investigation has been completed provided that there is no need to protect the identity of the complaint, and the complaint contains no scurrilous or defamatory statements. In the past the Commission has on occasion issued a public notice to its licensees for the purpose of alerting them to a possible widespread rule violation or misinterpretation based on complaints received against a licensee or licensees who after an investigation were not formally sanctioned by the Commission because their violation was not found to be willful or repeated. It is foreseeable that instances could arise where the disclosure of such complaints, or the complaint's identity, would serve no useful purpose, and could perhaps be harmful. However, it is unclear under the bill's language whether such information could be justifiably withheld on the basis of a public interest determination. We therefore would urge clarification of the proposed exemption, or elimination of this third exception.

Likewise, we are also unclear as to the scope of the amendment to subsection (c) of the Act made by section 3 of the bill. Subsection (c) now provides that the Freedom of Information Act is not authority to withhold information from Congress. The bill appears to impose a more affirmative duty, i.e., that notwithstanding subsection (b), an agency *shall furnish* any information or records to Congress or any Committee of Congress promptly upon written request to the head of each agency by the Speaker of the House of Representatives, the President of the Senate, or the chairman of any such committee as the case may be. It is, of course, the policy of the Commission to cooperate in every way with the Congress in keeping it apprised of our functions and activities. However, to the extent that the proposed language may be construed to broaden an agency's obligation to furnish information to Congress, it should be noted that we have on occasion had to delay access to records pertaining to a case in an adjudicatory posture to avoid prejudice to the rights of participants and to protect the integrity of the quasi-judicial process. One such case, for example, involved a Commission decision in a hearing case still subject to reconsideration where, in the absence of any indication of wrongdoing, the Committee's request for records was considered to be analogous to an improper *ex parte* contact which could give the appearance of influencing the Commission's decision on reconsideration. Of course, we readily make such records available to the Congress upon the completion of an adjudicatory proceeding. Some clarification of the intent of section 3 in this regard may be helpful. Any such clarification might also make explicit that information so furnished to the Congress, and exempt from public disclosure, will remain non-public and be treated in a confidential manner.

Finally, Section 4 of the bill would add a new subsection (d) which would require each agency to submit to the appropriate committees of Congress an annual report detailing the agency's administration of the Freedom of Information Act during the preceding year. The bill enumerates seven topics which would be required to be included in the report. If the Congress decides that such a report would be useful to it in its function of overseeing the administration of the Freedom of Information Act, the Commission would be glad to comply with the requirement. However, we believe that the first topic to be included in the annual report, "(1) the number of requests for records made to such agency under subsection (a)," needs clarification. Subsection (a) of the Act refers to records which are routinely available for public inspection as well as those which are not routinely available. The Commission's procedures for making available records which are routinely available for public inspection call for the direct delivery to any individual asking for such material here at the Commission, or for mailing such material to the requestor. In these instances, no record is maintained of such public service. This procedure, which permits us to provide quick access and an expeditious response to the public, has been used successfully in handling thousands of requests. The evaluation of our performance can best be measured by the general absence of complaints received with respect to this type of request. Necessary supervision over this activity is being exercised by the heads of the respective bureaus or offices from whose files material is being requested. We believe that the major results of requiring a record keeping system for granting this type of request would be unnecessary delay to the requestor, and increased cost to the government. On the other hand, the Executive Director maintains a chronological log, which includes the type of request and disposition of all requests received, for information not routinely available for public inspection. This log could serve as a convenient basis for our enumeration of such requests in an annual report. For the reasons stated, we believe paragraph (1) should be clarified to specify that it pertains only to requests for records "not routinely available for public inspection."

The Commission hopes these comments will prove useful to the Subcommittee in this consideration of S. 1142.

The Office of Management and Budget advises that while there is no objection to submission of this report, the Administration opposes enactment of S. 1142 for the reasons stated by the Department of Justice.

This letter was adopted by the Commission on June 6, 1973; Commissioner Johnson concurring in part and dissenting in part and issuing a statement which is attached:

By direction of the Commission.

DEAN BURCH, *Chairman.*

STATEMENT OF COMMISSIONER NICHOLAS JOHNSON, CONCURRING IN PART  
AND DISSENTING IN PART

I do not believe the 10 and 20 day limitations are unreasonable, nor do I oppose the awarding of attorney's fees—which I believe have a salutary effect on Freedom of Information Act enforcement.

FEDERAL HOME LOAN BANK BOARD,  
OFFICE OF THE CHAIRMAN,  
Washington, D.C., June 14, 1973.

Hon. JAMES O. EASTLAND,  
Chairman, Committee on the Judiciary,  
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request, dated April 13, 1973 for the views of this Board on S. 1142, 93d Congress, a bill to amend section 552 of title 5, United States Code, known as the "Freedom of Information Act", along the lines suggested by the report of the Committee on Government Operations of the House of Representatives, entitled "Administration of the Freedom of Information Act" (H.R. Rep. No. 92-1419, 92d Congress, 2d Sess. (1972)).

I

Subsection (a) of Section 1 of the bill would amend the fourth sentence of 5 U.S.C. 552(a) (2) to require publication and distribution of the public index now maintained by each agency under the statute. It contains "identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published." This change does not track any of the "Legislative Objectives" of the House Committee Report. Further, no basis is laid for it in any of the information supplied or recommendations made in the report. This may indicate that thorough consideration has not been given to the technical problems that would be involved in the change.

The public index requirement of the Freedom of Information Act is not a very clear directive, even with the benefit of the gloss provided in the *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* (June, 1967), and there is reason to believe that the practices of agencies in complying with the present requirement vary widely. For some agencies a publication requirement would be no more onerous than the existing directive. For others, such as those issuing and indexing large numbers of orders, publication would be extremely burdensome and probably of no more value to the public than the unpublished index now made available in accordance with 5 U.S.C. 552. The publication requirement might in addition have the unintended effect of causing some agencies to narrow the range of existing indices to make them easier to publish. The public index system could be made more useful to the public by requiring publication only of that part of an index concerned with opinions and interpretations of an agency which have precedential significance. We would support an amendment that is so limited.

Subsection (b) would amend 5 U.S.C. 552(a) (3) by rewording the requirement that a request be for "identifiable" records to read "any request for records which (A) reasonably describes such records \* \* \*." It is clear from the House Report that the purpose of the amendment is to make the statutory language consistent with the determinations of the courts that a person seeking information need not make a detailed identification of the records sought. The purpose of the new wording are unobjectionable. But since the courts have given the existing statutory language ("identifiable records") an interpretation that provides the results presumably wished for by the draftsmen (*Bristol-Myers Co. v. FTC*, 283 F. Supp. 745 (D.D.C. 1968); *Wellford v. Hardin*, 315 F. Supp. 768 (D.D.C. 1970), a statutory amendment may not be necessary.

Subsection (c) would amend § 552 (a) by adding a new paragraph (5) at the end thereof. In substance, the new paragraph would require an agency to grant or deny a request for information within ten working days, to notify a person whose request had been denied of the right to appeal within twenty working days, and to rule on an appeal within twenty working days. If an agency did not comply with a time limit, the requesting person would be deemed to have



exhausted his administrative remedies. Although the idea of such limitations upon agency action is reasonable, a ten day period is too brief in view of the practical difficulties that they face. The bill calls for a "determination" within ten days and, if the determination is favorable to the request, production of records "as soon as practicable". This would allow an agency to make an initial determination and then have a reasonable period to get its records out of storage. However, the process of locating and assembling records may take considerable time if the records are located in several different places within the agency or in a Federal Records Center or a distant storage building. Unfortunately, there are many instances in which an adequate determination cannot be made before a responsible official of the agency can review the records. If the records are difficult to obtain promptly, a ten day period might be required to obtain them, and there would be no time allowed for review. The Board therefore recommends that the statute be flexible enough to allow greater time in such situations although a specific period could be specified as a goal or a norm.

Subsection (d) would amend the third sentence of § 552(a)(3): (1) by providing for *in camera* examination of agency records by the court that will rule on a complaint against the agency for withholding records; (2) by providing specifically for *in camera* examination of records withheld pursuant to § 552(b)(1) ("specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy") in order to determine if disclosure of such records would be harmful to the national defense or foreign policy of the United States. We should not object to the first change so far as our own records are concerned, although we do not believe it should be required routinely. We take no position on the second.

Subsection (e) would add two new sentences to § 552(a)(3). The first would require the Government to file responsive pleadings to freedom of information cases within twenty days, and the second would allow the assessment of reasonable attorney fees and other litigation costs against the United States in a freedom of information case in which the Government did not prevail. The first sentence would shorten the time available to the Government from the sixty days allowed under Rule 12 of the Federal Rules of Civil Procedure to the time allowed under Rule 12 to private litigants. We understand that the Department of Justice objects to this amendment; the Board defers to the Department's view on this matter.

## II

Subsection (a) of Section 2 of S. 1142 would amend the second exemption of the Freedom of Information Act (5 U.S.C. 552(b)(2)), which now reads "related solely to the internal personnel rules and practices of an agency", by inserting "internal personnel" immediately before "practices" and by inserting "and the disclosure of which would unduly impede the functioning of such agency" at the end. The first proposed change seems unnecessary, and the new phrase proposed to be added to the end of the exemption to narrow it would seem to be unnecessary in light of the narrow judicial interpretation of the exemption found in several recent decisions.

Subsection (b) would amend the fourth exemption of the Act (5 U.S.C. 552(b)(4)), which now reads "trade secrets and commercial or financial information obtained from a person and privileged or confidential," by inserting "obtained from a person which are privileged or confidential" immediately after "trade secrets" and by striking the "and" before "privileged or confidential" at the end of the phrase and replacing it with "which is". The second change seems unnecessary; it is clear that the words "privileged and confidential" already modify "commercial or financial information". The first change, however, attempts to eliminate an ambiguity in the existing language. It should be remarked, however, that this exemption would still remain subject to the criticisms that have been made of it in the past. Both the Attorney General and Professor Davis (in Davis, *The Information Act, a Preliminary Analysis*, 34 U. Chi. L. Rev. 787 (1967)) have shown that the words of this exemption do not express the intentions of Congress in passing the Act. Most notably, both legislative history and common sense indicate that the United States Government should be able to withhold some information submitted to it in confidence even if it is not "trade secrets" or "commercial or financial information". The 1964 version of the bill (S. 1666) which provided for the exemption of "trade secrets and other information obtained from the public and customarily privileged or confidential", but

was changed without explanation, may not have been perfect, but was more clearly consistent with what appears to have been the legislative purpose.

Subsection (c) would amend the sixth exemption ("personnel and medical files and similar files" 5 U.S.C. 552(b)(6)) by substituting "records" for "files" in both places in which it appears. The intention is to prevent an agency from mingling exempt and non-exempt records in a single file and declaring the file as a whole to be exempt. The Board has no objection to this objective, but believes the amendment may be unnecessary and that the courts are alert to prevent any abuses.

Subsection (d) would amend the seventh exemption (5 U.S.C. 552(b)(7)), which now reads "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency", by substituting "records" for "files", by requiring that such records be compiled for a "specific" law enforcement purpose "the disclosure of which is not in the public interest" and by excepting from the exemption not only records available by law to a party other than an agency, but records that are "(i) scientific tests, reports, or data, (ii) inspection reports of any agency which relate to health, safety, environmental protection, or (iii) records which serve as a basis for any public policy statement made by any agency or officer or employee of the United States or which serve as a basis for rulemaking by any agency". The addition of "specific" to the phrase "law enforcement purpose" and the additional insertion of "the disclosure of which is not in the public interest" are unnecessary in light of recent judicial interpretations of the law enforcement exemption. In addition, the Board objects to the third specific exception to the exemption, which deals with records providing a basis for agency statements or rulemaking. An agency regulating financial institutions, such as the Board, frequently conducts investigations for "specific" law enforcement purposes. The disclosure of the records of such investigations is clearly not in the public interest, owing in large part to the possible damage to an institution or to such institutions in general and to their borrowing and saving members and to the Federal Savings and Loan Insurance Corporation. It is not at all unlikely that information acquired in the course of such an investigation might be used as the basis of a policy statement or of a preventive regulation of a general nature issued while the investigation is still running its course. Although the general basis of such a rule should be explained by an agency, it seems clear that in such a situation, disclosure of the investigatory records should not be required. It appears, however, that S. 1142 would require such disclosure. Beyond particular examples of this nature, the wording of the new exemption is unfortunate, requiring that records, "the disclosure of which is not in the public interest", must be disclosed nevertheless if they fall within three broad categories. Should Congress ever require disclosure that is not "in the public interest?" It does not appear that the attempt to balance public interest considerations of disclosure against nondisclosure has been successfully achieved in this part of the proposal to amend the seventh exemption.

### III

Section 3 of S. 1142 would amend subsection (c) of § 552, which now reads as follows:

"This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress."

The proposed amendment would designate the first sentence of (c) as paragraph (1). Paragraph (2) would provide that any agency shall furnish any information or records promptly upon written request by the Speaker of the House, the President of the Senate, or the Chairman of any committee of Congress, "notwithstanding subsection (b)". Insofar as this pertains to the possible use of subsection (b) as a ground for refusing a Congressional request, the change is unnecessary: the existing language is quite clear on this point. The expansion of subsection (c) to treat in detail of relations between agencies and Congress is not in harmony with the rest of the Administrative Procedure Act, which treats of relations between agencies and the public. Further, the proposed amendment may go beyond negating the use of subsection (b) to deny Congressional requests and strike at the doctrine of executive privilege; but it is unclear under the language of the amendment whether the effect of the change would be limited to a clarification of existing subsection (c) or would be so broad as to concern executive privilege. Accordingly, the proposed amendment of subsection (c) is objec-

tionable on two grounds: (1) lack of harmony with the rest of the Administrative Procedure Act; (2) lack of clarity.

#### IV

Section 4 of S. 1142 would add a new subsection (d) to 5 U.S.C. 552 that would require each agency to file an annual report with the House Committee on Government Operations and the Senate Judiciary Committee concerning its handling of requests under the Freedom of Information Act. The Board has no objection to this proposed amendment.

The Office of Management and Budget has advised that, from the standpoint of the program of the President, there is no objection to the submission of this report.

Sincerely,

THOMAS R. BOMAR, *Chairman.*

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FEDERAL MARITIME COMMISSION,  
OFFICE OF THE CHAIRMAN,  
Washington, D.C., June 13, 1973.

Hon. JAMES O. EASTLAND,  
*Chairman, Committee on the Judiciary,*  
*U.S. Senate, Washington D.C.*

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Federal Maritime Commission with respect to S. 1142 a bill to amend section 552 of title 5, United States Code, known as the Freedom of Information Act.

The bill would in effect assure the public greater access to records and formulate specific procedures for making information available. The bill would provide for both administrative and judicial remedies to obtain the information where the agency's denial of a request appears unjustified.

The Federal Maritime Commission endorses the ideology of the Freedom of Information Act. We are not convinced, however, of the need for S. 1142. In the event your Committee, after hearing should determine to act favorably on this legislation we urge that the following be taken into consideration.

We oppose any attempt to allow indiscriminate access to information the disclosure of which is prohibited by section 20 of the Shipping Act, 1916 (46 U.S.C. 819), the administration of which this Commission is charged.

S. 1142 would amend subsection 552(b)(7) of title 5, U.S. Code, by adding several new provisions, including subsection 552(b)(7)(B)(iii). This provision would require access to information upon which any public policy statement is based when made by the Commission, or an official or employee thereof, or which serves as a basis for rulemaking. This provision appears to be in conflict with title 5, U.S. Code, 552(b)(5) which specifically exempts inter-agency or intra-agency memorandums or letters from disclosure to any party other than another agency in litigation with the Commission. We would oppose any amendment which would have the effect of eliminating this exemption.

Proposed subsection 552(d)(1) to title 5 would require the Commission to maintain extensive records of requests for records made, and to report to Congress the number of such requests filed annually. The Commission currently maintains records on *denials* of requests based upon the Freedom of Information Act and the pertinent information relating to such denials. However, thousands of requests are made annually for such records as described in title 5 U.S.C. 552(a) which are routinely granted. It would appear that the benefit sought by proposed subsection 552(d) is to monitor the relatively few agency *denials* of requests and the reasons therefor, and not the multitudinous instances where requests are granted. We, therefore, oppose this provision insofar as it pertains to maintaining records and reporting instances in which access to Commission records are granted.

Finally, the proposed amendments to subsection 552(a)(3) would require the court to examine *in camera* any agency records to determine if such records should be withheld under any of the criteria set forth in subsection 552(b). It is our view that the judiciary should be allowed discretion in the determination of which records should be so examined. Accordingly, we recommend that paragraph (d)(1) of Section 1 of the bill be stricken. Appropriate conforming revision should be made in paragraph (d)(2) of Section 1.



The Office of Management and Budget has advised that there would be no objection to the submission of this letter from the standpoint of the Administration's program.

Sincerely,

HELEN DELICH BENTLEY,  
*Chairman.*

FEDERAL TRADE COMMISSION,  
*Washington, D.C.*

HON. JAMES O. EASTLAND,  
*Chairman, Committee on the Judiciary,*  
*U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: This is in response to your letter of May 17, 1973, requesting the Commission's views on S. 1142, a bill "To amend section 552 of title 5, United States Code, known as the Freedom of Information Act."

The Commission believes that the release of more information about the operation of federal agencies is a worthwhile and beneficial goal. Great strides were made in this regard in 1966 when the Freedom of Information Act became law. However, the Commission recognizes, as do many other people, that there are certain deficiencies in the present Act which need correcting. S. 1142 represents an extensive attempt to cure these deficiencies. It reflects careful consideration of the study of the Act published by the House Committee on Government Operations in H. Rep. No. 92-1419, 92nd Congress, 2d Session, and the recommendations made by the Administrative Conference in Recommendation No. 24, adopted May 1971: "Principles and Guidelines for Implementation of the Freedom of Information Act."

While the Commission recognizes and supports continued efforts to make more government records available to the public, it feels that past efforts have largely failed to deal effectively with the practical problems which agencies face in trying to administer the law fairly and efficiently. The present Act is ambiguous and difficult to apply in many specific situations. Unfortunately, in our opinion S. 1142 does not come to grips with these problems.

Below is a discussion of the specific provisions of the bill. In some instances an effort has been made to point out certain problem areas which are not dealt with by the bill, but which the Commission feels must be faced and solved before an adequate public information system can be obtained.

## DISCUSSION OF SPECIFIC PROVISIONS OF THE BILL

### A. AMENDMENTS TO SECTION (A) OF THE ACT

#### 1. *Publication of Opinions, Statements of Policy and Instructions*

In the present Act, section (a) (2) requires that final opinions, statements of policy, and staff instructions not published in the Federal Register must be made available for public inspection. Section 1(a) of S. 1142 would instead require the publication and distribution of such material.

The Commission has no objection to this modification, although it questions what is intended by requiring the "distribution" of such material, and wishes to stress that any requirement of distribution is going to involve additional printing and mailing costs.

We do, however, have one suggestion for clarifying the scope of section (a) (2). The Commission believes that any modification of this provision of the Act should attempt to clarify the relationship between this provision and the application of the exemptions in section (b). For example, agencies are understandably reluctant to disclose instructions to their staffs which they feel will hinder their enforcement efforts.

Attempting to reconcile this problem, a recent court decision has read section (a) (2) as requiring public inspection unless the release of such documents would reveal enforcement strategy which will enable a person to avoid prosecution. *Hawkes v. IRS*, 467 F.2d 787 (6th Cir. 1972). Another example of the need for reconciling these two provisions is presented by staff manuals, which would fall within the publication requirement of section (a) (2), but which could be construed as intra-agency memoranda exempt from disclosure under (b) (5). We recommend that Congress carefully examine and specifically provide for the resolution of the conflict between the requirements of (a) (2) and the exemptions of subsection (b).

## 2. Identifiable Records

Section (a) (3) of the Act presently requires that requests for access must describe "identifiable records". S. 1142 amends the present requirement to require only that requests "reasonably describe" the desired records. The cases which have dealt with this question indicate that courts will compel disclosure of documents described in a reasonable request. *See, a.g., Irons v. Schuyler*, 321 F. Supp. 628, 629 (D.D.C. 1970). The amendment will affirm these judicial interpretations which permit a requesting party substantial latitude in describing the desired documents. The Commission has no objection to this restatement of the present interpretation of the Act.

## 3. Time Limitation and Right to go to Court

Section 1(c) would require agencies to (1) determine within 10 days whether they will comply with a request; (2) grant 20 days to appeal and notify persons of that right; and (3) decide appeals within 20 days. The Commission is sympathetic to complaints that agencies often take too long to respond to requests for access. However, we do not believe that rigid time limitations provide a promising approach to solving the problem.

The Commission asks the Committee to recognize the mass of documents and other difficulties with which agencies must deal in responding to many requests. Not only are agencies' records necessarily filed so as to facilitate their use for the primary purpose of the agency rather than to facilitate grants of access, but requests are often vague and complex. Perhaps agencies could be expected to handle narrow or routine requests within the times specified, but it would be unreasonable to require the processing of complicated requests for large quantities of documents within these deadlines.

At a minimum, the Commission would suggest that extended time limits be established for certain categories of requests. We would like to call the Committee's attention to H.R. 4960, 93rd Congress. Section 303 of that bill would provide for special extended time limits for determining whether to comply with certain categories of requests. While the Commission does not necessarily endorse the specifics of this section of H.R. 4960, it does recommend consideration of the approach taken.

At present the Commission acknowledges all requests for access within 10 days and its one-step procedure does not require appeal of denials of access. Rather, any staff recommendation that access be denied is referred to the Commission for its final determination, and hence, all proposed denials are reviewed at the highest level in the Commission structure prior to any notification to the requesting party. The Commission feels that any legislation should authorize such a one-step procedure and provide an adequate time frame for its operation.

This section of the bill would further provide that failure to meet the deadlines will constitute an exhaustion of administrative remedies. Although obviously intended to encourage agencies to meet the deadlines, to the extent the deadlines cannot practically be met, its unintended result may be to throw into the courts unnecessarily a great many requests which given adequate time, might well have been granted by the agency.

## 4. Requirement of In Camera Inspection

Section 1(d) of S. 1142 would require a reviewing court to undertake *in camera* inspection of documents withheld by the agency. This requirement would extend to documents exempt under "executive privilege." Recently, the Supreme Court in *EPA v. Mink*, 41 U.S.L.W. 4201 (U.S. Jan. 22, 1973), found that *in camera* inspection was neither necessary nor inevitable, and that agencies could demonstrate by surrounding circumstances that the documents were correctly withheld. The Supreme Court was critical of an appellate court decision that classified documents should be examined *in camera*. It also found no reason why documents for which an exemption is claimed must be examined *in camera*, if the reviewing court was satisfied that the nondisclosure was proper under the Act without such examination.

Section 1(d) would seem to reverse the holding of *EPA v. Mink, supra*. The Commission believes that *in camera* inspection is a useful tool in reviewing denials of access requests, but to require it in every case would place a heavy burden on the courts and would likely result in the very delays which other sections of the bill are designed to eliminate. Where an agency can show that surrounding circumstances evidence the exempt nature of the documents, and a

court feels justified in so finding, it serves no purpose to require *in camera* inspection.

### 5. Answers to Complaints

Section 1(e) requires the government to answer complaints filed under the Act within 20 days after service. While the Commission sympathizes with the desire to have complaints regarding denials of access answered on an expedited basis, it also believes that the government should have an adequate time to prepare its case. Therefore, although the 60 day period presently provided by the Federal Rules of Civil Procedure may be too long, the Commission recommends a period of at least 30 days for the Government to answer.

## B. AMENDMENT TO SUBSECTION (B), THE EXEMPTIONS

Section 2 of the bill attempts to clarify some of the language setting forth exemptions from the disclosure requirements of the Act. The Commission has experienced serious problems in its efforts to apply these exemptions. In the following discussion of the amendments to the exemptions, an attempt has been made to point out these problems, and to recommend areas in which further efforts to more clearly express the intent of Congress might be worthwhile.

### 1. Personnel Rules and Practices

Section 2(a) would change exemption 2 by inserting "internal personnel" before "practices," and by further limiting the exemption to situations where release would impede the functioning of the agency. The Commission raises no objection to this amendment, but would like to point out that it may be inconsistent with the prior legislative history of this provision. The exemption was apparently meant to cover only the most mundane personnel policies. S. Rep. No. 813, 89th Cong., 1st Sess. at 8 (1965). Yet the disclosure of this variety of internal rules of practices seldom, if ever, unduly impede the functioning of any agency. Thus, the proposed amendment will in effect rescind this exemption.

### 2. Confidential Information

Section 2 (b) would amend exemption 4 to read "trade secrets *obtained from a person which are privileged or confidential* or commercial or financial information obtained from a person and *which is* privileged or confidential. This exemption has been the most difficult provision of the Act to interpret. Professor Davis found that it is impossible to understand. K. Davis, *The Information Act: A Preliminary Analysis*, 3411, Chic. L. Rev. 761, 788 (1967). The Commission believes that lack of clarity of this exemption is responsible for much of the delay in responding to requests for access.

The legislative history clearly indicates that the intent of Congress was to permit agencies to withhold information not customarily released to the public by the person submitting the information, *Attorney General's Memorandum of the Public Information Section of the Administrative Procedure Act*, 20 Ad. L. Rev., 263, 302-303 (1967), because the purpose of this provision is to permit a citizen to confide in the government without losing his right to keep information private, *Bristol-Myers v. FTC* 424 F.2d 93, 938 (D.C. Cir.) *cert. denied* 400 U.S. 824 (1970). There is thus an implication in the legislative history, but not in the language of the Act itself, that the government owes a duty to a citizen to protect the confidentiality of information submitted voluntarily which the private party would not make public. It is not clear whether this test can be followed with confidence. There seems to be a trend both in court decisions and in congressional discussion towards release of information which appears to be of the type intended to be covered by this exemption. The Commission requests explicit adoption of language which would clearly express the intent of Congress. If Congress wishes to release some or most information obtained by the government from its citizens, then an effort must be made to more clearly define the limits of such disclosure, including the types of information to be disclosed, the circumstances under which disclosure is to be made and what protection, if any, is afforded to, or can be granted to, the person from whom information is sought or by whom it is volunteered. More substantial modification than that contained in S. 1142 is required.

The Commission would also question the specific provision of the amendment which requires that trade secrets must be privileged or confidential, since it would seem that trade secrets are by definition confidential, and therefore privileged. The second change would seem to run counter to the original intent



of Congress to include all varieties of privileged information, and not just commercial or financial information. S. Rep. No. 813, 89th Cong., 1st Sess. at 8 (1965). The exemption was expressly intended to include doctor-patient, attorney-client privileges. Protection of this type of information probably should be separate from an exemption for confidential commercial information, but the amendment simply removes such protection from the statute.

In short, section 2(b) is inadequate to deal with the myriad of problems which arise in interpreting and applying exemption 4. The Commission strongly recommends a major effort to study and reformulate this exemption.

### 3. Personal Privacy

Section 2(c) of the bill would amend exemption 6 to exempt "records" and not "files" as it presently does. The Commission cannot object to this change, but suggests further study of invasion of individual privacy required by the Act. (See Miller, *Personal Privacy in the Computer Age: the Challenge of a New Technology in an Information Directed Society*, 67 Mich. L. Rev. 1089, 1194 (1969).)

### 4. Investigatory Files

Section 2(d) would amend the investigatory file exemption to establish limitations on the present broad language. It would exempt only those files compiled for a "specific" law enforcement purpose the disclosure of which would not be in the public interest. As in the present Act, investigatory files would be made available to a party in a proceeding. The bill would further specifically require disclosure of scientific tests, reports or data; and inspection reports contained in such files. The amendment would also prohibit agencies from withholding the background information that served as a basis for a policy statement or rule.

The bill goes a long way toward providing a solution to this persistent problem. Since enactment, the extent of the investigatory file exemption has been confused. It can be argued that the drafters of the Act meant to protect investigatory files without limitations. *Frankel v. SEC*, 460 F.2d 813 (2d Cir. 1972) *cert. denied* — U.S. — (1973). But some judicial interpretations of the exemption have placed limits on its application. In *Bristol-Myers v. FTC*, 429 F.2d 935, 939 (D.C. Cir.) *cert. denied* 400 U.S. 824 (1970) the court said that the exemption extends only to investigatory files which relate to an imminent law enforcement proceeding. Another court released material in an investigatory file which it found would not prematurely disclose the government's case. *Wellford v. Hardin*, 315 F. Supp. 175 D. Md. (1970), *aff'd* 444 F.2d 21 (4th Cir. 1971). These attempts to ensure against agency abuse of this exemption have confused what appeared to be rather clear statutory language.

Except for subsection (B), Section 2(d) does clarify this exemption to some extent. Although it broadly exempts law enforcement files, it does warn agencies against its liberal use by providing that the records must be compiled for a "specific" law enforcement purpose. Thus, only information relating to a specific case in being would be exempt. In addition, the amendment requires the agency to determine whether nondisclosure will be in the public interest. Agencies can expect to be reversed if they attempt to define the public interest too broadly.

However, the Commission does not support the revisions contained in subsection (B) as presently written. This provision would seem to require the agency to release certain documents even though their release would not be in the public interest. In addition, the Commission believes that paragraph (iii) of that subsection is too broad. Finally, the Commission feels that categorical exceptions to this exemption should be themselves subject to the exception that release would not be required where the agency found that the damage to its investigational or prosecutorial function would outweigh any public interest to be served by the disclosure.

Accordingly, the Commission supports the passage of this amendment without subsection (B).

## C. CONGRESS

### 1. Access to Congress

Section 3 of S. 1142 defines precisely when an agency must supply Congress with information otherwise exempt from disclosure. Under this provision, an agency must provide Congress with such information only when it receives a request from an official of Congress, e.g., the Chairman of committees and subcommittees. The Commission supports a clear statement of this policy.

## 2. Annual Report

Section 4 of the bill would require an annual report to Congress on Information Act compliance. The report would give the number of requests, denials, appeals, days taken to respond, and complaints to court, along with rules of practice pertaining to information policy. The Commission does not object to this requirement.

By direction of the Commission.

LEWIS A. ENGMAN, *Chairman.*

FEDERAL POWER COMMISSION,  
Washington, D.C., August 21, 1973.

HON. JAMES O. EASTLAND,  
*Chairman, Committee on the Judiciary,*  
*U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: Pursuant to the request contained in your letter to me dated April 13, 1973, I am forwarding herewith three copies of the Commission's report on S. 1142, a bill to amend the Freedom of Information Act.

Sincerely,

JOHN N. NASSIKAS, *Chairman.*

[Enclosure.]

### FEDERAL POWER COMMISSION REPORT ON S. 1142, 93D CONGRESS

The bill proposes numerous changes in the Freedom of Information Act. The Commission's comments are set forth below seriatim.

1. Section 1 (a) of the bill would amend Sec. 552 (a) (2) of the Administrative Procedure Act to require prompt publication and distribution (by sale or otherwise) of copies of "a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published." The documents referred to are final opinions and orders, statements of policy and interpretations (which the Commission publishes and distributes) and administrative staff manuals and instructions (which are not published but available for inspection and copying).

The Commission publishes daily and distributes a list of formal documents issued by the Commission and its administrative law judges which provides a convenient enumeration to current actions taken by the Commission and its administrative law judges. It also includes in the FPC News which is published weekly the same lists issued during the prior week. The documents listed in both publications are not indexed by subject matter but by title of the proceeding (usually by company name). The publication of a complete subject-matter index (inclusive of administrative manuals and interpretations) would present no undue burden upon the agency but prompt publication of a *current* index could be interpreted as requiring publication of a complete updated index almost on a daily basis which would be costly and burdensome to the Government. We would not have any problem publishing our own index monthly or quarterly.

2. Section 1(b) would amend Sec. 552(a) (3) to require the agencies to make records of documents other than those listed in Sec. 552(a) (1) and (2) available when "reasonably described" in lieu of the present statute which requires that they be "identifiable".

This amendment would be consistent with the present practice of the Commission's Office of Public Information, and therefore we view the amendment as unnecessary.

3. Section 1(c) would add a new paragraph (5) to Sec. 552(a) placing time limitations on agency decisions whether to comply with requests for records made under subsections (1), (2) or (3). That provision would provide that agency non-compliance with the time limitations shall constitute exhaustion of administrative remedies permitting appeal to a Federal district court.

Regarding other documents, the Commission's present Rules of Practice and Procedure (18 CFR § 1.36) provide:

#### "§ 1.36 Public Information and requests.

\* \* \* \* \*

"(d) Other records. Records not made part of the public records by this section may be requested in writing, accompanied by a showing in support thereof,

filed with the Secretary and will be made available for public reference upon good cause shown by order of the Commission or the Chairman, where consistent with the public interest and permitted by the Commission's statutory authority.

"(e) Procedure in event of withholding of public records. In any case where there is a question of interpretation under paragraph (c) of this section, the question shall be resolved informally, if possible, by the Director of the Office of Public Information. If the question cannot be resolved informally, the person seeking such record may request the Secretary, by petition filed pursuant to § 1.7, to make such record available for inspection and copying. The Secretary shall either cause the record to be made available or shall state in writing the basis for his determination that the document requested is not a public record under paragraph (c) of this section. If the Secretary denies the petition, the person seeking the record may appeal such denial to the Commission by petition conforming to the requirements of §§ 1.15 through 1.17."

We are in agreement with the purposes intended to be effected by the proposed change. However, the 10-day limitation may in some cases be difficult or impossible to comply with. Some requests involve files in storage, others require staff search before a determination can reasonably be made whether disclosure would be consistent with the public interest. Under these circumstances a longer period would appear desirable.

Failure of the Commission to act upon an appeal from the Secretary's refusal to make documents available within the 20-day limitation would render the proceeding subject to district court review under the proposed amendments to the Administrative Procedure Act. We suggest that the period be extended to 30 days to be consistent with our current practice on matters submitted for Commission decision by administrative law judges or upon the filing of appeal's from their rulings.<sup>1</sup>

4. Section 1 (d) would amend Sec. 552 (a) (3) by specifically requiring the district court to examine the contents of agency records *in camera* to determine whether such records come within the exemptions set forth in subsection (b) and whether disclosure of records required by Executive order to be kept secret in the interest of the national defense or foreign policy would be harmful to the national defense or foreign policy. This change would statutorily adopt the *in camera* procedure in every case which is now employed by the courts only in exceptional cases to determine whether an agency's claim of privilege under Sec. 552 (b) is a proper one.<sup>2</sup>

Section 1 (e) sets a 20-day time limit for the serving of answers to complaints filed in a district court. In view of the need for prompt disposition of actions initiated to obtain disclosure of records heretofore held not subject to the provisions of the Freedom of Information Act, a shortening of the 60-day period provided the Government for serving its answer under the Rules of Civil Procedure appears desirable. However, the proposed language appears to be absolute so that the district court would not have discretion to enlarge the time for answer even if circumstances would otherwise require such action. We suggest that the bill be revised to empower the district court to have such discretionary authority.

The proposed provision would also authorize the district court to assess reasonable attorney fees and other litigation costs to successful complainants. We do not agree with the proposal requiring the Government to pay attorneys' fees in this respect.

5. Section 2 (a) would amend Sec. 552 (b) (2) by providing that the second exempted category shall apply to "internal personnel rules and internal personnel practices" instead of "internal personnel rules and practices". The proposed additional qualification that "the disclosure of which would unduly impede the functioning of such agency" would not affect operations of agencies such as the Federal Power Commission whose administrative rules serve only to implement the employment practices of published Civil Service regulations.

<sup>1</sup> Section 1.28 (c) of the Commission's regulations provides (18 CFR § 1.28(c)):

"(c) Commission action. Unless the Commission acts upon questions referred by presiding officers of the Commission for determination or upon appeals taken to the Commission from rulings of presiding officers within thirty days after referral or filing of the appeal, whichever is later, such referrals or appeals shall be deemed to have been denied. The parties to the proceeding shall be given appropriate notice of the date of the referral or appeal, by the presiding examiner or the appellant as the case may be."

<sup>2</sup> The amendment does not seek to alter the existing provisions of Sec. 552(b) (3) which makes privileged matters specifically exempted from disclosure by statute.



6. Section 2(b) would amend Sec. 555(b) (4) to qualify trade secrets as those "obtained from a person which are privileged or confidential". The proposed revision would not affect the operations of this agency.

7. Section 2(c) would amend Sec. 552(b) (6) to substitute the word "records" for "files" as applied to personnel matters. Although the revision appears to broaden the statute regarding this type of privileged data, the privilege if applicable should be extended to all written matters concerning the subject and not solely to records related thereto.

8. Section 2(d) would amend Sec. 552(b) (7) regarding investigatory files by exempting those compiled for a *specific* law-enforcement purpose. It would hold not privileged not only investigatory records available by law to a party other than an agency (as in the present statute) but also (i) investigatory records which are scientific tests, reports, or data, (ii) inspection reports of any agency which relate to health, scientific, or environmental protection, or (iii) records which serve as a basis for any public policy statement made by any officer or employee of the United States or which serve as a basis for rule-making by any agency.

The proposed change relaxing the statutory exemption regarding investigatory records which might affect this agency's operations adversely is item (iii) above, since, it would apply to many staff studies leading to policy statements and rulemaking heretofore not available to the public except at the Commission's discretion. Public disclosure of such internal analysis and studies, except to the extent specifically relied upon as a basis for promulgation of the rule, could stifle the introduction of new ideas to the solution of regulatory problems.

We believe that this position follows from the same reasoning that was given for exempting interagency and intra-agency memoranda and letters from public disclosure under the Freedom of Information Act (5 U.S.C. 553(e) (5)). The House report explained that exemption as follows:

"Agency witnesses argued that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended, and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to "operate in a fishbowl." Moreover, a government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation. (H. Rept. 1497 89th Cong., 2d Sess., p. 10)"

9. Section 3 would amend Sec. 552(c) to provide that agencies shall furnish any information or records requested by the Speaker of the House of Representatives, the President of the Senate or the Chairman of any committee, subcommittee or joint committee. Since repeals by implication are not favored in the law, *Safe Harbor Water Power Corporation v. FPC*, 124 F.2d 800 (CA3, 1941), certiorari denied, 316 U.S. 663 (1942), neither the existing provision repeals nor would the proposed revision repeal the protection accorded privileged information by Section 301(b) of the Federal Power Act and Section 8(b) of the Natural Gas Act. Those sections prohibit any member, officer or employee of the Commission from divulging any fact or information which may come to his knowledge during the course of examination of records of jurisdictional companies, except as directed by the Commission or by a court. The Commission has exercised its statutory authority in this connection only with regard to proprietary information submitted under representation that it would not be divulged. Since this provision may involve a question of constitutionality we defer to the Department of Justice for its views thereon.

10. Section 4 would add a new subsection (d) to Sec 552 requiring submission annually to the Committees on Government Operations setting forth *inter alia* the number of requests for records and the number of denials thereof. The Commission's Office of Public Information currently maintains a count of written requests for files and information. Since oral requests would be included by the language, that Office could extend its recordkeeping to account for the extensive use of its filed materials made available on oral request. It would not, however, be able to maintain records of information made available in its reading room which provides self-service access to certain filed data. More importantly, other bureaus and offices of the Commission are frequent sources of information upon oral request. To comply with the proposed revision, all branches of the agency would require additional recordkeeping procedures which would additionally

tax its manpower and which would prove burdensome. We suggest that the provision, if adopted, be made applicable only to written requests.

JOHN N. NASSIKAS.

FEDERAL RESERVE SYSTEM,  
BOARD OF GOVERNORS,  
Washington, D.C., May 23, 1973.

Hon. JAMES O. EASTLAND,  
*Chairman, Committee on the Judiciary,*  
*U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: Thank you for the opportunity to present the Board's views regarding S. 1142, a bill to amend section 552 of Title 5 of the United States Code, known as the Freedom of Information Act.

In general, the Board supports the objectives of the proposed amendments to the Freedom of Information Act and has no objections or reservations with respect to those amendments except as hereinafter indicated.

Section 1(c) of the bill would provide specific time limits for determination by an agency as to whether it should comply with a request for records and for determinations with respect to an appeal from an agency's denial of an access to records. Although the Board is in sympathy with the purposes of this provision, it feels that it should be amended to permit an agency, upon notice to the requester, to defer such determinations beyond the periods specified if there is reasonable grounds for doing so. Such a provision for deferment of determinations in exceptional cases is included in recently adopted amendments to the rules of the Department of Justice relating to the production or disclosure of information.

Section 2(d) would amend paragraph (7) of section 552(b) of Title 5 of the U.S. Code, relating to the exemption of investigatory records from disclosure, to require such records to be made available in any case in which they serve as a basis for a public policy statement by the agency or serve as a basis for rule making. The Board questions whether this requirement is necessary. There could be instances in which disclosure of records compiled in the course of a law enforcement proceeding would hamper the effectiveness of such proceedings, even though such records might form a part of the background for subsequent public policy statements or rule making proceedings by the agency.

We hope the foregoing comments will prove helpful to you in the consideration of this matter. Please let me know if we can be of further assistance.

Sincerely yours,

ARTHUR F. BURNS.

GENERAL SERVICES ADMINISTRATION,  
Washington, D.C., May 25, 1973.

Hon. JAMES O. EASTLAND,  
*Chairman, Committee on the Judiciary,*  
*U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: Your letter of April 13, 1973, requested the views of the General Services Administration on S. 1142, 93rd Congress, a bill "To amend section 552 of title 5, United States Code, known as the Freedom of Information Act."

The bill would make certain clarifying and technical amendments to the Act; provide additional detail regarding time periods for replying to requests for information, filing appeals, and deciding appeals; and require annual reports from agencies providing certain statistics relevant to requests for information.

GSA defers to the views of the Department of Justice, the agency which administers the Freedom of Information Act, on the merits of the bill.

The Office of Management and Budget has advised that, from the standpoint of the Administration's program, there is no objection to the submission of this report to your Committee.

Sincerely,

ALLAN G. KAUPINEN,  
*Assistant Administrator.*

INTERSTATE COMMERCE COMMISSION,  
OFFICE OF THE CHAIRMAN,  
Washington, D.C., June 11, 1973.

HON. EDWARD M. KENNEDY,  
*Chairman, Subcommittee on Administrative Practice and Procedure, U.S. Senate,*  
*Washington, D.C.*

DEAR CHAIRMAN KENNEDY: This is in response to your request for our comments on S. 1142, a bill, "To amend section 552 of title 5, United States Code, known as the Freedom of Information Act". The apparent purpose of the legislation is to assure the general public easy access to all Government records whose disclosure would not be contrary to the public interest nor harmful to the national defense or foreign policy of the United States.

The Commission has always supported the right of the public to be informed of our activities and those of other Federal agencies. We have made every effort to comply with the Freedom of Information Act and support the legislation to the extent that it is designed to clarify its intent. However, we do have reservations about some of the bill's provisions.

For example, the law now requires that agencies make available for public inspection and copying a current index providing identifying information to the public as to any matter issued, adopted, or promulgated after July 4, 1967. Section 1(a) of the legislation would amend section 552(a)(2) of the United States Code to require agencies to "promptly publish, and distribute (by sale or otherwise)" such an index. While we agree with the concept of making information readily available, we believe that this provision is unclear and that it could place a substantial burden upon Federal agencies. For example, the term "promptly" is not defined. Also, while the amendment requires distribution of the index, it is not clear as to whom the copies are to be distributed. If the index is required to be published for free widespread distribution, it could result in a wasteful use of funds because people who have no interest would be receiving it. We believe that if this subsection is retained, it should be amended to require distribution only to those who request the service at an appropriate fee.

The Commission presently publishes and offers for sale an index of our regulations in the Code of Federal Regulations and of our formal decisions. Expansion of these activities in order to comply with the revision of section 552(a)(2) at this time would place a substantial burden on this agency. Such a program could not be effectively implemented without an increase in our budget and staffing levels.

We have no objection to section 1(b) of the bill which amends section 552(a)(3) of title 5, United States Code, to require that agencies make records available upon any request which "(A) reasonably describes such records." Presently, the statute requires that records be made available "on request for identifiable records". The amendment liberalizes the requirement by making a reasonable description sufficient and leaves the determination of what is "reasonable" with the agency. This portion of the legislation appears to be an attempt to codify the interpretation placed upon this provision of the Act by the United States Court of Appeals for the District of Columbia in *Bristol-Meyers Company v. Federal Trade Commission*, 424 F.2d 935 (D.C. Cir. 1970).

Section 1(c) of the bill adds a new paragraph (5) to section 552(a) of title 5 of the United States Code. It establishes a time frame of ten days within which an agency must determine the disposition of a request for records and notify the requesting party of the reasons for that determination. In the case of a determination not to comply with a request, the agency must immediately notify the person making the request that he has 20 days within which to appeal the decision to the agency. The agency then has 20 days in which to decide on the appeal.

These time limits seem reasonable with respect to routine requests. However, it leaves little time for consideration of complex issues which may arise out of such a request. We recommend that this section be modified to allow an agency, in certain instances where a request or an appeal has been under active consideration, but a determination could not be reached, to advise the party that a decision will be forthcoming without undue delay.

When court action is brought by a requester, section 1(d) of S. 1142 would authorize the court to examine disputed records in camera to determine whether they are within the scope of any exemption in the Act. We have no objection to this provision.



Section 1(e) requires the agency to answer any court complaint within 20 days after its service on the United States Attorney, and allows the court to assess costs and attorneys' fees against the United States when the ruling goes against the agency. Under Rule 12(a) of the Federal Rules of Civil Procedure, the Government presently has 60 days to answer such complaints. Reduction of this period would place many Federal agencies in a time bind. The provision relative to attorneys' fees could result in an increase rather than reduction of litigation of these matters in court. At the bare minimum, this section should be amended to require a finding of bad faith as a condition precedent to recovery of these items. For that reason, we oppose the enactment of this section of the legislation.

Section 2 of the legislation contains amendments which clarify certain of the exemptions to the provisions of the Freedom of Information Act. Section 2(a) clarifies the exemption relative to internal personnel matters and further provides that the exemption shall apply only to such information "the disclosure of which would unduly impede the functioning of such agency". Sections 2(b) and (c) make editorial changes in the exemption relative to trade secrets and medical records. Section 2(d) amends the exemption relative to records compiled for law enforcement purposes and details certain specific instances in which the exemption shall not apply. The Commission has no objection to these changes.

Section 3 of the bill provides that agencies shall furnish information or records to Congress or to a Congressional Committee upon written request of the Speaker of the House, the President of the Senate, or the Chairman of any Committee or Subcommittee. This provision seems to be somewhat restrictive on Members of Congress in their individual requests for such information. However, we have no objection to this section.

Section 4 of the legislation adds a new subsection (a) to 5, United States Code, 552, which requires agencies to submit annually, a report to the Committee on Government Operations of both the House and the Senate which shall include certain information with respect to the agency's compliance with this Act. We have no objection to this provision, but would suggest that your Subcommittee consider requiring that this information be included in our annual report to Congress.

Section 5 of the legislation establishes its effective date as 90 days from the date of enactment.

The Commission continues to be vitally concerned with keeping the public and the Congress well informed of our activities, and we support the legislation, subject to our suggested revisions. We believe that S. 1142 does clarify the intent of the Freedom of Information Act and we object only to those portions which would require excessive expenditures or unduly hamper the operation of Federal agencies in the fulfillment of their respective missions.

Thank you for the opportunity to comment on this legislation.

Sincerely yours,

GEORGE M. STAFFORD, *Chairman.*

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NATIONAL LABOR RELATIONS BOARD,

Washington, D.C., June 7, 1973.

HON. JAMES O. EASTLAND,  
*Chairman, Committee on the Judiciary,*  
*U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: This letter is in response to your earlier request for this Agency's views on S. 1142, a bill to amend the Freedom of Information Act.

Of the proposed amendments there appears to be only one provision which may have significant and/or adverse impact on this Agency.

Section 2(d) of S. 1142 contains the provision about which we have reservations and reads:

"(7) investigatory records compiled for any *specific* law-enforcement purpose the disclosure of which is *not in the public interest* except to the extent that . . ." [Emphasis added.]

The use of the term, "specific" may be construed to open investigatory files compiled by an Agency for policy making purposes and appears to diminish the protection currently accorded "investigatory files."

Perhaps more significant, the language proposes a different standard for exemption of such files, namely, "not in the public interest" standard. While use of such a term has understandable appeal, its interpretation may be difficult and

may well lead to extensive litigation as agencies and courts give varying interpretations of what constitutes the "public interest." Consequently, this Agency is opposed to this provision.

The remainder of the amendments proposed by S. 1142, are of limited significance to this Agency, e.g., limiting disclosure where it would be harmful to the national defense or foreign policy of the United States, (Section 1(b)), and therefore it was deemed unnecessary to review the balance of the proposed amendments in detail.

The Office of Management and Budget has advised it has no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

EDWARD B. MILLER, *Chairman.*

NATIONAL MEDIATION BOARD,  
Washington, D.C., June 1, 1973.

Re S. 1142, a Bill to amend Section 552 of Title 5, United States Code, known as the Freedom of Information Act.

HON. JAMES D. EASTLAND,  
*Chairman, Committee on the Judiciary,*  
*U.S. Senate,*  
*Washington, D.C.*

DEAR MR. CHAIRMAN: Pursuant to your request, the National Mediation Board has studied the above-captioned bill in order to convey this agency's views regarding the effect of the proposed amendments on our present practices in making information available to the public.

As you are aware, the Board's primary responsibility under the Railway Labor Act is to assist, by mediation, in the negotiation of collective bargaining agreements in the railroad and airline industries. The Board has construed Section 552(b)(4) as exempting, as confidential, disclosures or negotiation positions in labor-management mediations. In our view the proposals in S. 1142 would not change the Board's present rules regarding the confidentiality of these matters.

Additionally, the National Mediation Board treats the representation desires of employees as confidential and it is our understanding that the proposed amendments do not effect the Board's rules or practice in this matter.

The National Mediation Board, a small agency, receives very few requests for information, generally or pursuant to the Freedom of Information Act. Thus, the revised reporting and responding amendments would not unduly burden our agency.

The proposed amendments regarding expediting litigation procedures do not appear to unduly burden the staff of the National Mediation Board. However, since the Civil Division of the Department of Justice represents the Board in the federal courts, we would defer to that agency's comments. It might be noted that the National Mediation Board has never been a litigant in a Freedom of Information Act legal action.

The National Mediation Board presently publishes and distributes indexes to its decisions. These indexes are contained within bound volumes of the decisions and thus the amendments to Section 552(a)(2) would not change the National Mediation Board's present practice.

The amendments to Section 552(b)(7) do not effect the National Mediation Board since the Board has no law enforcement powers under the Railway Labor Act.

The National Mediation Board endorses the spirit and intent of the Freedom of Information Act and has disclosed and made available the documents which the Act does not exempt.

The Office of Management and Budget advises that from the standpoint of the Administration's program, there is no objection to the presentation of this report for the consideration of the Committee.

Sincerely,

DAVID H. STOWE, *Chairman.*

RAILROAD RETIREMENT BOARD,  
Chicago, Ill., June 1, 1973.

HON. JAMES O. EASTLAND,  
Chairman, Committee on the Judiciary,  
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is the report of the Railroad Retirement Board on S. 1142 introduced by Mr. Muskie, for himself and 13 other Senators, on March 8, 1973.

The bill would amend section 552 of title 5, United States Code, known as the Freedom of Information Act (FOIA). The bill, if enacted, would expand and update the provisions of the FOIA for the stated purpose of more effectively implementing its original objective of providing the public with a broad means of acquiring information from Government agencies. In furtherance of this objective, the bill would require agencies to "publish and distribute," rather than the present "make available for public inspection and copying," a current index of: (1) opinions made in the adjudication of cases, (2) policy statements and interpretations adopted, and (3) administrative staff manuals that affect the public. Also, the bill would require prompt agency response on FOIA requests; i.e., within 10 days after receipt of the request and within 20 days on administrative appeals following denials to the requesting party (in either case, Saturdays, Sundays, and legal public holidays are excepted). In this connection, Government agencies would be required by the bill to file answers and other responsive motions in FOIA civil suits within 20 days instead of the 60 days allowed under the Federal Rules of Civil Procedure. Additionally, in civil cases where an agency has denied information under any of the nine permissive FOIA exemptions for disclosure, the bill would require the courts to examine privately the contents of any agency records to determine if such records or any part thereof shall be withheld. This would include records of information, the disclosure of which is specifically prohibited by Section 12(d) and 12(n) of the Railroad Unemployment Insurance Act. Moreover, the bill specifically provides that Congress, upon written request to an agency, be furnished all information or records, notwithstanding the statutory prohibition of disclosure of such information. Lastly, the bill would establish a mechanism for Congressional review by requiring annual reports from each agency on their record of administration of the FOIA, including certain statistical data, changes in its regulations, and similar types of information, all of which must be reported on or before March 1 of each calendar year for the preceding calendar year. Specifically, the bill would require the following information:

(1) the number of requests for records made to such agency under subsection (a);

(2) the number of determinations made by such agency not to comply with any such request, and the reasons for each such determination;

(3) the number of appeals made by persons under subsection (a) (5) (B);

(4) the number of days taken by such agency to make any determination regarding any request for records and regarding any appeal;

(5) the number of complaints made under subsection (a) (3);

(6) a copy of any rule made by such agency regarding this section; and

(7) such other information as will indicate efforts to administer fully this section."

As has been stated, the bill would require the Board to publish promptly and distribute (by sale or otherwise) the current index of information which it presently maintains, pursuant to the FOIA, for the purpose of public inspection and copying. The Board assumes that the requirement to distribute the index would be complied with by making it available for sale at the Government Printing Office.

#### VIEWS OF THE BOARD

The Board has published a list of all of its manuals in the Code of Federal Regulations, Title 20, Chapter II, Section 200.3. We believe that this is adequate for that purpose. If necessary it would be possible for the Board to publish the tables of contents of the manuals.



With respect to policy decisions which have been contained in Board Orders or legal opinions it would be almost impossible to compile an index of all decisions made from 1936 to date. It would also be difficult to make a compilation from 1967 to date, if that is what is desired. However, if the index of Board decisions and legal opinions were limited only to those which occur after the enactment date of the pending legislation, the Board would have no difficulty in complying.

It has been our experience that individuals who are concerned with these decisions do not attempt to look them up themselves but call the Board. The usual practice is for informal discussions over the telephone or for informal letters. The Board has always complied with any such request. Thus, this raises the question of the necessity for an index to Board decisions and legal opinions.

We believe that the above indexes should be taken into account in making a decision on the desirability of the proposed amendments to the Freedom of Information Act with respect to an agency of this character. We believe further that the Board should be treated the same as similar agencies, including Social Security and the Veterans Administration.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the administration's program.

Sincerely yours,

R. F. BUTLER, *Secretary.*

SELECTIVE SERVICE SYSTEM,  
OFFICE OF THE DIRECTOR,  
Washington, D.C., May 7, 1973.

Hon. JAMES O. EASTLAND,  
*Chairman, Committee on the Judiciary,*  
*U.S. Senate.*

DEAR MR. CHAIRMAN: This is in response to your request for the views of this agency on S. 1142 (93d Congress), "A Bill to amend section 552 of title 5, United States Code, known as the Freedom of Information Act."

We have had the benefit of the analysis of the bill that Senator Muskie inserted in the *Congressional Record* for March 8, 1973, at p. S 4156 on the occasion of his introducing the bill.

Our practices in the area to which the bill relates would not be affected directly by most of the provisions of the bill. We shall confine our comments to those provisions of the bill which, if enacted, would impose a substantial burden upon our operations.

Section 1(a) of the bill would require agencies to publish and distribute copies of material that is now required to be available for public inspection and copying. Costs of implementing this provision by this agency would likely be excessive. Quantities required would probably be too small for economical duplication. The opportunity for abuse by those who merely desire to harass our agency will be increased were this proposed provision enacted.

The proposal in section 2(d) of the bill to amend section 552(b)(7) of title 5, United States Code by establishing (7)(B)(iii), if enacted, would impose much uncertainty and great potential burden upon this agency. One would have difficulty in thinking of a record which would not "... serve as a basis for any public policy statement ... or ... for rulemaking," but its identification might be difficult and "fishing expeditions" would be encouraged. The proposed language could be a basis for substantial harassment by those not sympathetic to the responsibilities of this agency.

Attention is invited to the following points in the drafting of the bill:

(a) p. 1 line 3—"fourth" probably should read "first".

(b) p. 1 line 5—"and" does not appear in the text to be deleted.

(c) the text resulting from the enactment of section 1(a) of the bill would be awkward.

(d) p. 2 line 7—" (C) " probably should read " (c) ".

(e) p. 3 lines 18 and 19—the words "and the burden is on the agency to sustain its action" are surplusage.

(f) p. 6 line 24—" (a) " probably should read " (a) (3) ".

We are advised by the Office of Management and Budget that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

BYRON V. PEPITONE.

SMALL BUSINESS ADMINISTRATION,  
OFFICE OF THE ADMINISTRATOR,  
Washington, D.C., June 13, 1973.

HON. JAMES O. EASTLAND,  
Chairman, Committee on the Judiciary,  
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This will reply to your letter of April 13, 1973, requesting the views of the Small Business Administration on S. 1142, a bill to amend 5 U.S.C. 552, the Freedom of Information Act.

Section 1(a) would require agencies to publish promptly and distribute (by sale or otherwise) copies of a current index providing identifying information for the public as to opinions, orders, statements of policy, interpretations, staff manuals and the like issued, adopted, or promulgated after July 4, 1967. Under current law such an index must now be made available for public inspection and copying. Unless there is a compelling need for this proposed change, we have serious doubts that the administrative burden and expense of maintaining a "for sale" inventory of such an index, particularly a continually changing one, could be justified.

Section 1(b) reduces the degree of particularity with which a person must identify a record by requiring only a reasonable identification of the record. We favor this change.

We question the desirability of firm time limits for agency responses to requests for records and to appeals of denials of requests, believing that requests of any kind made of a Government agency, whether under this law or any other law, should be handled as expeditiously as possible. There is always the danger that time limits become the norm. But there is also the danger that setting a priority of treatment for one aspect of an agency's activities will make other responsibilities of an agency seem less important and not deserving of equally prompt treatment.

Section 1(d) would apparently counter the January 23, 1973, decision of the Supreme Court of the United States in *Environmental Protection Agency v. Mink* by permitting in camera examination of agency records by the courts. Since records required by Executive Order to be kept secret in the interest of the national defense or foreign policy are generally outside of the jurisdiction of this agency, we defer to the views of those agencies more properly concerned on this point. With regard to nonclassified records, we believe that the Supreme Court decision provided a reasonable middle ground, first giving the agencies a reasonable opportunity to demonstrate to the court by means short of an in camera inspection (e.g., detailed affidavits or oral testimony) that the records are clearly beyond the range of material that would be available to the requester.

Section 1(e) reduces the time available to the United States for answering complaints to 20 days and makes the United States subject to reasonable attorney fees and litigation costs where it does not prevail. Although our initial reaction is to consider 20 days too brief a period, we defer to the views of the Department of Justice which is responsible for litigation involving this agency.

Section 2(a) would further limit the exemption from disclosure for matters relating to internal personnel rules and practices of an agency by having the word "personnel" expressly modify practices as well as rules. We do not favor this change. It does not protect from disclosure manuals and other instructions to agency staffs governing enforcement methods which, if disclosed, would defeat the valid objective of inducing voluntary compliance. If agencies must reveal classes or types of violations which are left undetected or unremedied because of limited resources some persons will be encouraged to disregard laws and regulations.

Such a change might also adversely affect policies or instructions setting out guidelines to determine the circumstances under which the Government would be willing to compromise obligations owing to it. Other sensitive information might include negotiating techniques for contracting officers, schedules of surprise audits and inspections, and similar matters.

Section 2(b) would change the language of the fourth exemption under the Freedom of Information Act so as to limit it to trade secrets, commercial information, and financial information, all of which must also be privileged and confidential. There is widespread difference of opinion on the reach of the present law, with some support for the proposition that it includes information which is not commercial, financial, or trade-secrets and which private individuals would wish to keep confidential for their own purposes. We favor this broader view of the

fourth exemption and prefer to see language formulated to clarify the broader exemption. It may be that the third exemption already provides necessary protection for trade secrets and commercial and financial information inasmuch as it can be read as incorporating by reference the provisions of 18 U.S.C. 1905. In any event, there is a need to dispel the doubts as to the effect of 18 U.S.C. 1905 caused by the decision in *Schapiro v. Securities and Exchange Commission*, 339 F. Supp. 467 (D.D.C. 1972).

Section 2(c) seems to restrict the sixth exemption, which now covers personnel, medical and similar files, by substituting "records" for "files." If we understand the effect of the change, it removes from the exemption certain records within a file the disclosure of which would not involve an unwarranted invasion of personal privacy, even though the file as a whole is exempt. We have no objection to this change. However, this exemption should be broadened to include a prohibition against the release of mailing lists of employees, agency clientele, advisory council members, and the like for purposes of commercial or other solicitation.

Section 2(d) amends the seventh exemption so that such matters as scientific tests, reports, or data, inspection reports relating to health, safety, or environmental protection, or records underlying public policy statements, or rulemaking by an agency would not be exempt even though contained in investigatory records. We oppose such a sweeping change in the language of this provision, preferring to let a workable interpretation of its scope evolve through the courts which constantly deal with this kind of problem.

We are not clear on the effect of adding the word "specific" so as to exempt from disclosure "investigatory records compiled for any specific law enforcement purpose." Hopefully, an investigatory record would not lose its identity for purposes of the Freedom of Information Act because the Government decided not to pursue an enforcement action or because an enforcement action had already been completed.

Section 3 which relates to Congressional requests for information raises constitutional questions on which we defer to the Department of Justice.

Section 4 imposes a detailed annual reporting requirement upon agencies in order to demonstrate efforts to administer the Freedom of Information Act. While we have no objection to a reporting requirement, we believe that it is not practicable to determine "the number of requests for records made to such agency under subsection (a)." Agencies probably furnish on a fairly routine basis all kinds of information which would have to be reported. This can create a needless administrative burden unless a precise definition is formulated to define and limit what is a request for information under the Freedom of Information Act. We believe the formulation of a reasonably workable definition presents some difficulty. Reviewing agency refusals to disclose and the reasons for the refusals may well provide a reasonably satisfactory basis for evaluating administration of the law.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

THOMAS S. KLEPPE, *Administrator.*

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TENNESSEE VALLEY AUTHORITY,  
Knoxville, Tenn., May 10, 1973.

HON. JAMES O. EASTLAND,  
Chairman, Committee on the Judiciary,  
U.S. Senate, Washington, D.C.

DEAR SENATOR EASTLAND: This is in response to your letter of April 13 requesting our views with respect to S. 1142 to amend the Freedom of Information Act (5 U.S.C. § 552).

There are two provisions of the bill which give us special concern. First, section 1(a) would require the publication and distribution of an index of all records which are to be made available for public inspection and copying under the act. Based upon our experience, there appears to be little, if any, demand for an index with respect to the records of a regional development agency such as TVA which is not engaged in regulatory activities. We believe that in this kind of case the publication and distribution of such an index would constitute an unnecessary administrative burden and expense. Accordingly, we recommend deletion of the



proposed amendment in section 1(a) or its revision so as to make it applicable only to regulatory functions.

Second, section 1(d) (1) would provide that in the judicial review of an agency's determination as to the availability of its records the court would determine the matter de novo. We feel that the well-established legal principle that an agency's determination of a question within its jurisdiction shall be accepted if there is a substantial basis for it should be carried over to the judicial review of agency determinations as to the availability of records. Accordingly, we favor deletion of the proposed amendment in section 1(d) (1) or its revision to specify that the court's review will be on the basis of the existing record.

Section 3 of the bill would amend 5 U.S.C. § 552(c) to require any Executive agency to furnish information or records requested by the Congress or any committee thereof. Since this legislative proposal involves the separation of powers between the legislative and Executive branches of the Government, we do not feel that we are in a position to comment upon it. It has always been TVA's policy to provide information as to its activities upon request by the Congress or a committee or member thereof.

The Office of Management and Budget advises that it has no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely yours,

AUBREY J. WAGNER,  
*Chairman of the Board.*

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U.S. POSTAL SERVICE,  
LAW DEPARTMENT,  
Washington, D.C., June 6, 1973.

Hon. JAMES O. EASTLAND,  
*Chairman, Committee on the Judiciary,*  
*U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: This responds to your request for the views of the Postal Service on S. 1142, "To amend section 552 of title 5, United States Code, known as the Freedom of Information Act." This bill would tighten several of the exemptions to the Freedom of Information Act and make numerous changes in the rules for its administration.

The Postal Reorganization Act generally exempts the Postal Service from Federal laws dealing with agency operations, 39 U.S.C. § 410(a), but 39 U.S.C. § 410(b) (1) specifically applies the Freedom of Information Act, 5 U.S.C. § 552, to the Postal Service, subject to the limitations in 39 U.S.C. § 410(c). Under a well-known canon of statutory construction, subsequent amendments to specifically incorporated statutes do not affect the incorporating statutes. See 2 J. G. Sutherland, *Statutes and Statutory Construction* § 5208 (3d ed. 1943). In accordance with this principle, S. 1142, if enacted in its present form, would not apply to the Postal Service.

Naturally, the amendments would apply to the Postal Service if S. 1142 contained a provision specifically stating their applicability to the Postal Service or if the bill contained an amendment to the Postal Reorganization Act incorporating the provisions of the bill into that Act. Since the enactment of the Postal Reorganization Act, Congress has consistently inserted specific references to the Postal Service in bills it wished to apply to the Postal Service. Examples are H.R. 1746 and S. 2515, 92nd Cong., 1st Sess. (P.L. 92-261), the "Equal Employment Opportunity Act of 1972", and H.R. 11021 and S. 3342, 92nd Cong., 2d Sess. (P.L. 92-574), the "Noise Control Act of 1972."

If it is the intention of Congress to apply S. 1142 to the Postal Service, the bill should be amended by the addition of specific language accomplishing this result. The amendments to § 552 contained in S. 1142 would then be applicable to the Postal Service, to the same extent as is the present version of the section specifically incorporated in the Postal Reorganization Act.

Because of the qualified nature of the application of § 552 to the Postal Service, 39 U.S.C. § 410(c), and in view of the nature of most of the proposed changes and the generality of their application, we would generally defer to Congress on the policy issue of whether changes in the law should be made at this time. We object, however, to one proposed change, the new sentence that § 1(e) of the bill would add to § 552(a) (3) allowing successful litigants to recover "reasonable attorney fees and other litigation costs reasonably incurred." Instead of adding to the effectiveness of the Freedom of Information Act of permitting individual citizens or

public interest groups to obtain information from the Government in an expeditious manner, we fear that this provision would be more likely to encourage preliminary "fishing expeditions" by concerns able to afford the cost of litigation, such as those that are already contemplating contract or other litigation against the Postal Service. Congress has not found it wise to encourage litigation of other types by holding out the prospect of reimbursement for legal fees, and there would seem to be no reason to single out this area of the law for special treatment.

In our opinion, moreover, this provision would be inequitable, in the absence of a concomitant opportunity for agencies to recover litigation costs when they are successful. Application of this one-sided proposal to the Postal Service would be particularly unfortunate, in view of the generally self-sustaining charter under which the Postal Service operates. It would be anomalous to force the Postal Service to underwrite the legal fees of its adversaries, yet deny the Postal Service all opportunity to recover its own costs, regardless of the outcome of the litigation.

The stated purpose of this amendment would be to allow litigation costs "when attempts to obtain records under provisions of the Act are frustrated by arbitrary or capricious acts of the bureaucracy or by foot-dragging tactics." 119 Cong. Rec. S4156 (daily ed. March 8, 1973). Although we believe the best approach would be to delete the litigation costs provision altogether, we suggest, at a minimum, that the requirement for arbitrary or capricious acts or delays as a precondition to allowing such costs be written into the bill itself, rather than left to legislative history.

Sincerely,

ROGER P. CRAIG,  
*Deputy General Counsel.*

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VETERANS' ADMINISTRATION,  
OFFICE OF THE ADMINISTRATOR OF VETERANS AFFAIRS,  
Washington, D.C., June 21, 1973.

HON. JAMES O. EASTLAND,  
*Chairman, Committee on the Judiciary,*  
*U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: This is in response to your request for a report by the Veterans Administration on S. 1142, 93d Congress.

The bill is designed to amend 5 U.S.C. 552, the so-called Freedom of Information Act, in order to clarify strengthen, and improve its operations. Among other things, it proposes to require Federal agencies to publish and distribute, rather than make available for public inspection and copying, indexes of final opinions made in the adjudication of cases, statements of policy, and administrative staff manuals and instructions to staff that affect a member of the public. It would also require agencies to make records available to any person requesting them if the request "reasonably describes such records" whereas existing law requires that agencies make available "identifiable records."

S. 1142 also proposes to establish limited periods within which agencies will be required to respond to requests under the Freedom of Information Act. Action on original requests would be required within 10 workdays and within 20 days on administrative appeals filed following denial of the original request. The Government will be required to file answers to suits under the Act within 20 days after the receipt of the complaint. Another provision will permit the courts to require the Government to pay reasonable attorney fees and other litigation costs of persons who successfully litigate cases arising under the Act.

The bill also would modify several of the exemptions to the provisions of the Freedom of Information Act listed in 5 U.S.C. 552(b). Matters related to the internal personnel rules and practices of an agency (exemption 2) would only be exempt from release if the disclosure would "unduly impede the functioning of such agency"; trade secrets (exemption 4) would be exempt from release only if privileged and confidential; and the exemptions relating to personnel and medical files (exemption 6) and investigatory files compiled for law enforcement purposes (exemption 7) would be amended to limit the exemption to personnel and medical records and investigatory records compiled for law enforcement purposes, so as to preclude potential commingling of releasable material with material exempt from disclosure.

S. 1142 also proposes to establish a requirement of annual reports from each agency of the Government covering its activity under the Freedom of Information Act. The report would include such statistics as the number of requests received for records under the Act; the number of requests denied with reasons therefor; the length of time taken to handle such requests; agency rules issued in implementation of the Act; etc.

The proposed amendment to require that Federal agencies publish and distribute, rather than make available for public inspection and copying, indexes of final opinions made in the adjudication of cases, statements of policy, and administrative staff manuals and instructions that affect a member of the public, would create problems of administration and, insofar as the Veterans Administration is concerned would, we believe, be both wasteful and unnecessary. Final opinions rendered by the Veterans Administration in the adjudication of claims for benefits by veterans and their dependents and survivors are exempt from public disclosure by the provisions of 38 U.S.C. 3301, and are therefore not subject to the provisions of the Freedom of Information Act in view of 5 U.S.C. 552(b)(3). Such final opinions would not be affected by this proposed amendment. At the same time, however, because of the scope of Veterans Administration operations, the agency has an extremely large number of administrative staff manuals, staff instructions, and other issues. These are, of course, designed for use by agency employees. We currently publish an extensive "Index to Veterans Administration Publications" which is revised and reissued annually. Because we feel that very few, if any, of our internal publications would be of substantial interest or use to members of the public, we do not currently offer this 218-page volume for sale. Since most of the staff manuals, instructions, and other administrative issues referenced therein would not be for sale or readily available for reference except by visiting a Veterans Administration office, we seriously question the necessity of distributing the Index of those publications. It is our view that the current provision of 5 U.S.C. 552, making issues "available for public inspection and copying", is much more realistic in terms of the public's need for them.

The mandatory time limits in the handling of original requests, administrative appeals, and suits for records covered by the Freedom of Information Act can, we feel, become burdensome to the departments and agencies of the Government. While we strongly endorse the obvious intention of these provisions to preclude the possible use of "delaying" tactics to avoid disclosure of records coming within the scope of the statute, it seems obvious that there will be situations in which either the size of the workload confronting the agency, or the request involves a difficult, less than clear-cut question, would make the mandatory periods provided impossible to meet. It seems to us that it would be both realistic and in the public's interest to modify the proposed time limits to permit some added degree of administrative discretion based on individual circumstances. Certainly the reduction of the existing 60-day period for filing answers in suits under the Act to 20 days will create problems. The transmittal of papers alone between the agency involved, the Department of Justice (which has ultimate responsibility for handling the Government's defense), and the United States Attorney's Office (which actually handles the Government's litigation), in many instances, could involve a 20-day period.

Except for the provisions discussed above, the Veterans Administration defers to the Department of Justice with respect to S. 1142.

Advice has been received from the Office of Management and Budget that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

DONALD E. JOHNSON,  
*Administrator.*



Appendix, Vol. III to follow



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